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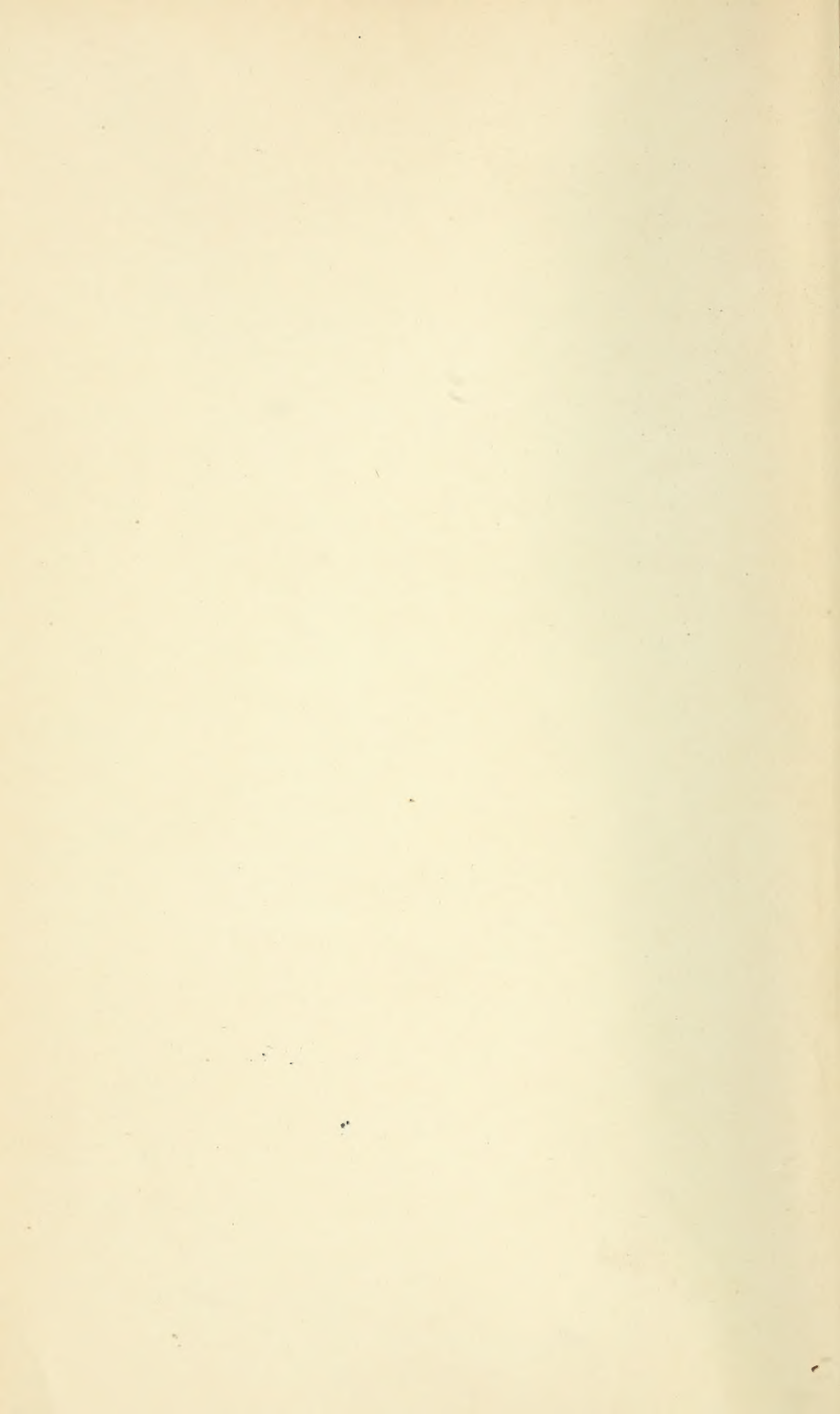
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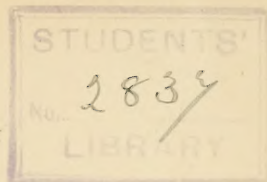
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A

TREATISE

ON THE

LAW OF GUARANTEES

AND OF

Principal & Surety.

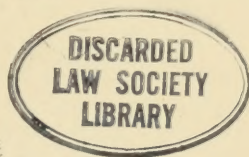
BY

HENRY ANSELM de COLYAR,

W

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

THIRD EDITION.



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PREFACE.

THE difficult and complicated branch of Mercantile Law dealt with by this work has certainly not diminished in importance since the last edition made its appearance. On the contrary, during the interval of twelve years that has elapsed since the publication of the second edition, many decisions have been given, of a noteworthy character, in England, Ireland, and the United States, which, directly or indirectly, concern the law of guarantees. All these decisions demand, and, it is believed, have received, adequate notice in the present edition, the Author's purpose being to make his treatise, as far as possible, serviceable not only in England, but also in the Colonies and in those countries, outside the limits of the British Empire, where the provisions of the Statute of Frauds, or similar enactments, have been adopted. He is the more anxious to achieve this purpose because he finds that since his treatise was first issued, an unauthorized edition of it has appeared in the United States of America, which, however, shows that the work has been appreciated in that country. Owing to the almost cosmopolitan character of the branch of law to which this work is devoted, the present volume necessarily refers to an unusually large number of cases decided elsewhere than in England. Many of these, and notably the decision given by the Irish High Court (Q. B. D.) in the case of *The Guardians of Abbeyleix Union v. Sutcliffe*, (1890), 26 Ir. L. R. 333, and by the American Court of Errors and Appeals of New Jersey in *Town of Union v. Bermes* (1882), 43 Amer. R. 369 (U.S.), on a point not as yet adjudicated upon in this country, will, it is believed, be ultimately adopted as authorities by English courts, which, in cases of first impression at all events, do not ignore judgments delivered by foreign tribunals, but, on the contrary, not unfrequently follow them.

Though the law of guarantees is perhaps *less* affected by modern legislation than any other branch of our legal system, several statutes have been passed, since this treatise was last published, which it has been found necessary to refer to in the present edition. Amongst these may be mentioned the Partnership Act, 1890 (*a*) (s. 18 of which replaces s. 4 of the Mercantile Law Amendment Act, 1856 (*b*)), the Bankruptcy Act, 1890 (*c*), the Married Women's Property Act, 1893 (*d*) and the Sale of Goods Act, 1893 (*e*). As the law of guarantees is often invoked by bankers and mercantile men in their dealings with their customers and others, and also specially concerns those insurance companies which are in the habit of giving guarantees for the fidelity and good conduct of persons holding public offices and places of trust, the Author has been specially careful, in the present edition, to deal with the branch of law in question, as far as possible, exhaustively from their respective points of view, and, it is hoped and believed, in such a manner as to make the subject intelligible not merely to the trained lawyer, to whom the treatise primarily appeals, but also to bank managers, directors, and others, who cannot claim to be regarded as legal experts.

Conscious of the extreme importance, to every law book, of a good index, the Author has endeavoured to improve upon the previous one by simplifying, as far as possible, its arrangement, and by multiplying its titles. The analytical Table of Contents has also been much enlarged, while the Table of Cases now gives the date of each case cited, together with references to the various reports.

H. A. de COLYAR.

1, ELM COURT,
TEMPLE, E.C.

February 24th, 1897.

(*a*) 53 & 54 Vict. c. 39. (*b*) 19 & 20 Vict. c. 97. (*c*) 53 & 54 Vict. c. 71.

(*d*) 56 & 57 Vict. c. 63.

(*e*) 56 & 57 Vict. c. 71.

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ADDENDA AND ERRATA.

At p. 213, after cases cited, in note (g), add these words, namely, "see *post*, p. 318—319 as to right of surety, under certain circumstances, to *compel* the creditor to sue the principal debtor for payment."

At p. 220, line six should read as follows, namely, "The respondent advanced money to T., at appellant's request, on his," etc.

A Treatise

ON

THE LAW OF GUARANTEES.

—:O:—

CHAPTER I.

OF THE FORMATION OF THE CONTRACT OF GUARANTEE.

A GUARANTEE is a collateral engagement to answer for the debt, default or miscarriage of another person. The person who gives the guarantee, is termed the *surety* or *guarantor* (a); the person to whom it is given, the *creditor* or *guarantee*; and the person whose debt, default or miscarriage is the foundation of the guarantee, the *principal debtor*, or simply, *the principal*.

Definition of
a guarantee.

Parties
thereto.

The contract of guarantee is of very ancient date, and appears, indeed, to be “coeval with the first contracts

Antiquity of
guarantees.

(a) In the case of *Imperial Bank v. London and St. Katherine's Dock Co.* (5 Ch. D. at p. 200), JESSEL, M. R., said :—“Whoever is liable to pay the debt of another, whether for value, as in the case of the broker who receives a commission for incurring liability, or gratuitously, as between himself and the person primarily liable, is a surety; and I can understand no definition of surety which will not include a person in that situation.” *Seem*, in *America*, there is a distinction between a surety and a guarantor. Thus, in *Kearnes v. Montgomery*, 4 West. Va. 29, MAXWELL, J., said :—“The contract of a guarantor is collateral and secondary. It differs, in that respect, from the contract of a surety, which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default.” See also *per* HUBBARD, J., in *Curtis v. Dennis*, 7 Metcalf 510; *Read v. Cutts*, 7 G. R. 186.

recorded in history" (a). It seems that originally the words warranty and guaranty (b) were the same; "the letter *g* of the Norman-French being convertible with the *w* of the German and English, as in the names William or Guillaume. They are sometimes used indiscriminately (c); but, in general, warranty is applied to a contract as to the title, quality or quantity of a thing sold . . . ; and guaranty is held to be the contract by which one person is bound to another for the due fulfilment of a promise or engagement of a third party" (d). To constitute a guarantee, just as to the formation of any other contract, there are three essential requisites, namely: the mutual assent of two or more parties; that the parties be competent to contract; and that the contract, if not under seal, be supported by a valuable consideration. It will be as well to consider briefly each of these essential requisites, but with special reference to one particular kind of contract, namely, the contract of guarantee, with which this work is directly concerned.

Difference
between war-
ranty and
guarantee.

Essential
requisites of
a guarantee.

First requi-
site.
Mutual assent
of parties.

First, then, as to the mutual assent of the parties.

Every contract includes a concurrence of intention in two parties, one of whom promises something to

(a) See Story on the Law of Contracts, 5th ed., vol. ii., p. 319, note 1. We read in Proverbs xi. 15, "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure."

(b) Now usually spelt *guarantee* or *guarantie*. It is (*e.g.*) spelt *guarantie* in the Government Officers (Security) Act, 1875 (38 & 39 Vict. c. 64). On the other hand, in the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18, the spelling *guaranty* is adopted.

(c) Not in England. In Scotland a guarantee is termed a "*cautiomy obligation*." This is the term used in the Mercantile Law Amendment Act, *Scotland*, 1856 (19 & 20 Vict. c. 60), and in s. 8 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), which Act applies to Great Britain and Ireland.

(d) Parson's Law of Contracts, 5th ed., vol. ii., p. 3. See definition of "Warranty" in s. 62 (1) of Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

the other, who, on his part, accepts such promise (e). Until, therefore, an acceptance, be given (which must be an absolute and unqualified acceptance of the previous offer (f)), the promiser is not liable (g). In

(e) Pothier on the Law of Obligations (Evans' Edition), vol. i., p. 4; and see *Chinnock v. Ely (Marchioness)*, 4 De G. J. & S. 638; *Staines v. Wainwright*, 6 Bing. N. C. 174; 8 Scott, 280.

(f) *Appleby v. Johnson*, L. R. 9 C. P. 158; and see *Crossley v. Maycock*, L. R. 18 Eq. 180; *Colonial Insurance Co. of New Zealand v. The Adelaide Marine Insurance Co.*, 12 App. Cas. 128; *Maconchy v. Trower*, (1894) 2 Ir. 663; *Smith v. Webster*, 3 Ch. D. 49. The fact that a simple acceptance of an offer contains a statement that the acceptor has instructed his solicitor to prepare the necessary documents does not render the acceptance a conditional acceptance. *Bolton Partners v. Lambert*, 41 Ch. D. 295, C. A.; *Chipperfield v. Carter*, 72 L. T. 487; *Bonnewell v. Jenkins*, 8 Ch. D. 70; *Dibbins v. Dibbins*, (1896) 2 Ch. 348. *Aliter* where the acceptance is "subject to our approving detailed contract." See *Page v. Norfolk*, 70 L. T. 781. Where the plaintiff having signed an agreement for the lease of a house to her by the defendant, which the latter subsequently signed but handed to her solicitor with instructions not to part with it except on the condition that the plaintiff obtained some responsible person to join in the lease—a condition which the plaintiff declined to fulfil—it was held that parol evidence was admissible to show that no agreement was come to between the parties, and that the true effect of the transaction was that the defendant declined to enter into an agreement on the terms of the written document, but at the same time made a counter-offer which was rejected, and that there was no agreement. *Pattle v. Hornibrook*, (1897) 1 Ch. 25.

(g) See generally on this subject, *Head v. Diggon*, 3 M. & Ry. 97; *Adams v. Lindsell*, 1 B. & Ald. 681; *Cooke v. Oxley*, 3 T. R. 653; *Stevenson v. McLean*, 5 Q. B. D. 346; *Byrne & Co. v. Van Tienhoven & Co.*, 5 C. P. D. 344; *Williams v. Carwardine*, 4 B. & Ad. 621; *Routledge v. Grant*, 4 Bing. 653; 1 M. & Payne, 717; *Denton v. Great Northern Ry. Co.*, 5 Ell. & Bl. 860; *Thatcher v. England*, 3 C. B. 254; *Lancaster v. Walsh*, 4 M. & W. 16; *Lockhart v. Barnard*, 14 M. & W. 674; *Kennedy v. Lee*, 3 Mer. 441, 454; *Johnson v. King*, 2 Bing. 270; *Holland v. Eyre*, 2 Sim. & St. 194; *The Sheffield Canal Co. v. The Sheffield and Rotherham Ry. Co.*, 3 Ry. & Canal Cases, 121 and 486; *Hyde v. Wrench*, 3 Beav. 334; *Dunlop v. Higgins*, 1 H. L. 381; *Mactier v. Frith*, 6 Wendell, 103, and judgment of Mr. Justice MARCY in that case; *Payne v. Cave*, 3 T. R. 148; *Ramsgate Victoria Co., Limited v. Montefiore*, L. R. 1 Exch. 109; *Ex parte Bloxam*, 33 L. J. Ch. 574; *Ex parte Cookney*, 28 L. J. Ch. 12;

Offer to
guarantee not
binding till
acceptance.

accordance with this doctrine, it has been decided that a mere *offer* to guarantee is not binding until *acceptance* by the person to whom the offer is made (a). Till then, it is *revocable* by the party making it (b). But when an offer is sent by letter it cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive till after the first letter has been received and answered (c). If, therefore, an offer is made to a person under such circumstances that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of accepting it (as where the parties negotiating live in different towns), the acceptance is complete as soon as it is posted; and a withdrawal of an offer is of no effect until it is brought to the mind of the person to whom the offer was made, and does not relate back to the time of posting it (d). It is

3 De G. & J. 170; *Ex parte Miles*, 34 L. J. Ch. 123; *Ex parte Beresford*, 2 Mac. & G. 197; *Hebb's case*, L. R. 4 Eq. 9; *Martin v. Mitchell*, 2 Jac. & W. 413, 428; *Countess of Dunmore v. Alexander*, 9 Shaw & Dunlop, 190.

(a) *M'Ivor v. Richardson*, 1 M. & S. 557; *Nash v. Spencer*, 13 T. L. R. 78; *Simmons v. Ward*, 2 Stark. 371; *Gaunt v. Hill*, 1 Stark. 10; *Mozley v. Tinkler*, 1 Cr. M. & R. 692; 5 Tyrr. 416; *Newport v. Spicer*, 7 L. T. (N.S.) 328. In a recent case where negotiations were by telegram and the final telegram was in itself an offer to buy and not an acceptance of a previous offer to sell, held no contract. *Harvey v. Facey*, (1893) A. C. 552. *Aliter* if an offer is *accepted* by telegram, for then the party accepting cannot repudiate the contract on the ground that his telegram had a meaning which would not be apparent to the other contracting party. See *Roth & Co. v. Tayser, Townsend & Co. and Others*, 1 Comm. Cas. 207, 306, C.A.

(b) *Offord v. Davies*, 12 C. B. (N.S.) 748; *Grant v. Campbell*, 6 Dow, H. L. C. 239; and see *Stevenson v. McLean*, 5 Q. B. D. 346.

(c) *Byrne v. Van Tienhoven*, 5 C. P. D. 344; 49 L. J. C. P. 316; *Stevenson v. McLean*, *ubi sup.*

(d) *Henthorn v. Fraser*, (1892) 2 Ch. 27, C. A.; and see *In re Imperial Land Co. of Marseilles, Harris' case*, L. R. 7 Ch. App. 587; *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. 666, 691; *Raeburn & Veril v. Burness & Sons*, 1 Comm. Cas. 22.

not generally necessary, however, that the acceptance should be *express*; it may be *implied*. Thus, where an offer of guarantee is in these terms, "I agree to be security to you for T. C. for whatever, while in your employ, you may trust him with, and, in case of default, to make the same good," as soon as the person to whom such a guarantee is given employs T. C. (but not before) the guarantee attaches and becomes binding on the party who gave it (e), without any express acceptance.

Acceptance may be express or implied. Examples of implied acceptance of offer to guarantee.

In *Pope v. Andrews* (f), Coleridge, J., said, "If a person offers a guarantee, and more still, if he signs a guarantee by which he makes himself liable, and that be sent to the other party, such other party, if he means not to accept the guarantee, is bound expressly to dissent within a reasonable time; and if he keeps the guarantee an unreasonable time, he is bound to accept it just the same as if he had assented to it by words; and if he has ever accepted it either by *word* or *by act*, he cannot afterwards retract."

In *Sorby v. Gordon* (g), the facts were as follow:—The defendant, being desirous of having goods shipped to R. & Co., his agents in India, on July 9th, 1868, applied by letter to the plaintiffs, who were manufacturers of edge tools carrying on business at Sheffield, asking the price of certain tools to be sent out to India to the firm of Messrs. R. & Co. In reply, the plaintiffs stated their list of prices, and that their terms were cash settlement in England within a few weeks. On the 11th of the same month the defendant wrote to them as follows:—"I shall be very glad that you should come to an arrangement

(e) Per PARKE, B., in *Kennaway v. Treleaven*, 5 M. & W. 498, 500, 501. See also *Offord v. Davies*, 12 C. B. (N.S.) 748.

(f) 9 C. & P. 564, 568.

(g) 30 L. T. R. 528.

with R. & Co., that they should be your agents there; but that requires direct correspondence between you and them. I am quite willing to guarantee the first shipment." The same day the plaintiffs enclosed a list of prices, and requested a confirmation of the order, which was accordingly sent by the defendant. The goods, amounting in value to 800*l.*, were thereupon shipped to R. & Co. in India. Other shipments followed. The sum of 300*l.* only having been paid by R. & Co. in respect of this first shipment, the plaintiffs, in July, 1871, wrote to the defendant, "We sincerely hope it may not be necessary to act upon your letter of the 11th July, 1868." In two letters which the defendant subsequently wrote to the plaintiffs he never disclaimed his liability, but on September 26th, 1871, he wrote, "As the event on which I expressed my willingness to guarantee never took place, it never became effective." Messrs. R. & Co. having stopped payment, and there being a sum of 530*l.* still due upon the first shipment of goods, the plaintiffs sued defendant upon his letter of guarantee. It was held, that upon the facts there was an express offer of a guarantee and an intimation of acceptance.

Express acceptance necessary where offer contemplates it.

Sometimes, however, an offer to guarantee contemplates an *express* acceptance. When this is the case, the person to whom the offer is made cannot avail himself of it without showing an *express* acceptance of it. Thus in *Mozley v. Tinckler* (*a*) the defendant gave an alleged guarantee in the following form: "F. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50*l.*; for my reference apply to B." This instrument was forwarded by B. to the plaintiffs, who never communicated their acceptance of it to

(*a*) 1 Cr. M. & R. 692. See also *Morten v. Marshall*, 2 H. & C. 305; *Bank of Montreal v. Munster*, 11 Ir. R. C. L. 47, 58; *Payne v. Ives*, 3 D. & R. 664; *Bank of Illinois v. Sloo*, 18 La. (Curry) 539.

the defendant. In an action against the latter, on the guarantee, it was held that the plaintiffs, not proving any notice of acceptance to the defendant, were not entitled to recover. In this case the court considered that the defendant only intended to be bound by the instrument, in case, upon inquiry, the plaintiffs should be satisfied with regard to his solvency.

If a man who makes an offer dies, the offer cannot be accepted after he is dead (*b*). This is, therefore, an exception to the rule previously stated, namely, that after acceptance of an offer there is a binding contract between the parties.

After death of person making offer there can be no acceptance.

A contract being the offspring of intention, it follows that the minds of the contracting parties must be *ad idem* as to the subject of the contract. Thus if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them (*c*). So, if a person is induced to buy certain oats from another, under the belief that they are *old* oats, the contract is binding, though the oats are actually not old. But if the person had agreed to take the oats, not merely under the belief that they were *old*, but under the belief that the seller *contracted* they were old, there would be no contract in such a case if this was brought to the mind of the seller by any means whatsoever (*d*). The reason of this somewhat subtle distinction is perfectly just. In the *former* case the minds of both parties would be *ad idem* as to the purchase of the oats in question, though the *motive* of the buyer in purchasing them might be his belief

Minds of contracting parties must be *ad idem* as to subject of the contract.

(*b*) Per MELLISH, L.J., in *Dickinson v. Dodds*, 2 Ch. D. at p. 475, C. A.

(*c*) *Smith v. Hughes*, L. R. 6 Q. B. 597.

(*d*) See *Smith v. Hughes*, L. R. 6 Q. B. 597, *passim*. And see *Raffles v. Wichelhaus*, 2 H. & C. 906.

that they were *old*. In the *latter* case the minds of the parties would not be *ad idem* as to the subject of the contract, for, whilst the buyer believed the seller contracted to sell *old* oats, the seller, knowing this, intended to supply oats that were not old. The mere fact, however, of one of the parties to a contract having put an erroneous construction upon it, and insisted that it included what it did not comprise, does not prevent there being a contract, nor preclude each party from waiving the question of construction and obtaining specific performance according to what the other party admits to be its true construction (*a*).

In Paley's Moral and Political Philosophy (*b*), it is stated that a promise is to be interpreted "in the sense in which the promiser apprehended at the time that the promisee received it." The English rule of law that the promiser is not bound "to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it," is a corollary to this rule of morality (*c*). And, in considering the question in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances (*d*). If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense in which the mind of the promiser does not assent (*e*). Sometimes, owing to the way in which one of the contracting parties has conducted himself,

Party may be
estopped by
conduct from

(*a*) *Preston v. Luck*, 27 Ch. D. 497.

(*b*) Book iii., cap. v.

(*c*) *Smith v. Hughes*, L. R. 6 Q. B. 597, 610.

(*d*) *Ib.*

(*e*) *Ib.* See also observations of KINDERSLEY, V.C., in *Small v. Currie*, 2 Drew, 112, 114.

he is precluded from showing that he intended something different from the other contracting party, and that, consequently, there is not that necessary concurrence of intention essential to every contract. Thus, if, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms (*f*). For the validity of a contract would seem to depend not on the *actual* consent of wills but their *apparent* consent on the part of contracting parties (*g*). So where the defendant (by mistake) chose to sign a guarantee which gave full effect to the plaintiff's intentions, and thereby induced the plaintiff to supply goods to a third person on the faith of such guarantee, it was held that the defendant was liable on his guarantee, and that he had no equity to turn round on the plaintiff and say, "I meant what I have not stated, and although you have relied upon my statement, I will only be liable for what I meant" (*h*). So, too, where, in the case of a sale of goods by sample, the vendor (by mistake) exhibited a wrong sample, it was held that the vendor could not, on that account, treat the contract as void (*i*). "But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the

denying concurrence of intention.

Examples of this doctrine.

(*f*) Per BLACKBURN, J., in *Smith v. Hughes*, L. R. 6 Q. B. 597, 607. See also *Freeman v. Cooke*, 2 Ex. 663; 18 L. J. Ex. 119; *Brogden v. Metropolitan Railway Co.*, 2 App. Cas. 666.

(*g*) Holland's Jurisprudence, 5th ed., p. 222.

(*h*) *Haymen v. Gover*, 25 L. T. (N.S.) 903; and see *Rawstone v. Parr*, 3 Russ. 539; and see per WILLS, J., in *Stewart and McDonald v. Young*, 38 Sol. J. 385.

(*i*) *Scott v. Littleddale*, 8 E. & B. 815.

vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him " (a). Again where an offer is made through an agent by telegram, and the offer is accepted by telegram, the contract is complete, and the party accepting cannot repudiate the contract on the ground that his telegram had a meaning which would not be apparent to the agent or the other contracting party (b).

Second requisite of contract of guarantee. Competency of parties to contract.

Secondly, we come to another requisite of a contract, namely the competency of the parties to contract.

We have already stated that every contract includes a concurrence of intention in two parties. This, in fact, enters into the idea of every contract. Now intention is a *voluntary* mental operation, being produced by a joint exercise of the *will* and the *understanding* (c). Therefore the parties to a contract must be *mentally capable* of producing the necessary intention; for, unless both have this capacity, there can be no contract between them. In accordance with this view is the maxim of the *civil* law, which declares that "*Furiosus nullum negotium gerere potest, quia non intelligit quod agit*" (d). The mere existence, however, of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion be connected with the subject-matter of such

(a) Per HANNEN, J., in *Smith v. Hughes*, L. R. 6 Q. B. at p. 609.

(b) *Roth & Co. v. Taysen Townsend & Co. and Others*, 1 Comm. Cas. 207; *S. C.*, C. A., 1 Comm. Cas. 306.

(c) As to which of these two *powers* of the mind predominates in the formation of intention we are not called upon to discuss. "The faculties of *understanding* and *will* are easily distinguished in thought, but very rarely, if ever, disjoined in operation." See "*Reid's Collected Writings*," by Sir W. Hamilton, 2nd ed., p. 537.

(d) Inst. lib. 3, tit. 20, § 8; Dig. lib. 50, tit. 17, l. 5, i. 40.

disposition or contract; it is a question for the jury whether the delusion affected the disposition or contract (*e*).

In England, in consequence of an old maxim of the common law, affirmed by Lord *Coke*, which declares that "a man shall not be allowed to stultify himself,"

Contracts by
insane
persons.

insanity, it would seem, was never a good defence to an action of assumpsit, unless it also appeared that the plaintiff knew of it and took advantage of the circumstance to impose upon the defendant (*f*). The law on this subject is thus laid down by Lord *Esher*, M.R., in the recent case of *Imperial Loan Co. v. Stone* (*g*): "When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."

Where the contract has been executed, in whole or in part, this affords an additional reason for not vacating it on the ground of insanity (*h*). Whether, if a person supplies *necessaries* to a lunatic, *knowing* of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied, was formerly considered

Liability of a
lunatic for
necessaries.

(*e*) *Jenkins v. Morris*, 14 Ch. D. 674; 42 L. T. R. 817, C.A.

(*f*) *Levy v. Baker*, Mood. & M. 106 n.; *Beavan v. M'Donnell*, 9 Exch. 309; *Davis v. Kirkwall*, 8 C. & P. 679; *Moss v. Tribe*, 3 F. & F. 297; *Lovatt v. Tribe*, 3 F. & F. 9; *Baker v. Cartwright*, 7 Jur. (N.S.) 1247; 30 L. J. C. P. 364; 10 C. B. (N.S.) 124; *Niell v. Morley*, 9 Ves. 478.

(*g*) (1892) 1 Q. B. at p. 601; see also *Brown v. Joddrell*, 3 C. & P. 30; M. & M. 105; as to proof of knowledge of defendant's incapacity, see *Beavan v. M'Donnell*, *supra*; *Greenslade v. Dare*, 20 Beav. 284; *Lovatt v. Tribe*, 3 F. & F. 9.

(*h*) *Molton v. Camroux*, 4 Exch. 17; *S. C.*, in court below, 2 Exch. 487.

doubtful (*a*). This doubt has, however, recently been set at rest, and the liability of a person of unsound mind for necessities suitable to his condition upheld (*b*). So, also, the law will raise an *implied* contract, and give a valid demand or debt against the lunatic or his estate for moneys expended for the necessary protection of his person and estate (*c*).

Equitable relief where contract made with person of unsound mind.

Courts of equity were always in the habit of giving relief where a person of weak intellect had entered into a contract, the nature of which justified the conclusion that the party had not exercised a deliberate judgment, but that he had been imposed upon, circumvented, or overcome by cunning or artifice, or undue influence (*d*). And the Chancery Division of the High Court of Justice has now power to set aside a contract in cases where the Court of Chancery formerly possessed jurisdiction to do so (*e*), while *any* division may, for the purposes of the action, give effect to an equitable defence alleging circumstances entitling the defendant to the reformation or cancellation of a contract (*f*).

Contracts by persons in state of intoxication.

Intoxication, if complete and not partial merely, will render an agreement entered into by a person in that

(*a*) *Per curiam*, in *In re Weaver*, 21 Ch. D. 615.

(*b*) *In re Rhodes*, *Rhodes v. Rhodes*, 44 Ch. D. 94, C. A. See also *Bagster v. Portsmouth (Earl)*, 7 D. & R. 614; 2 B. & C. 170; 3 C. & P. 178; *Stedman v. Hart*, 1 Kay, 607; 18 Jur. 744; 23 L. J. Ch. 908; and see the recent *American* case of *Fay v. Burditt*, 42 Amer. R. 142 (U.S.). The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2, now provides that where necessities (*i.e.*, goods suitable to his condition of life and to his actual requirements at the time of the sale) are sold and delivered to a person of unsound mind they must be paid for.

(*c*) *Williams v. Wentworth*, 5 Beav. 325. See also *Manby v. Scott*, 1 Sid. 112.

(*d*) Story, Eq. Jur., 10th ed., par 238.

(*e*) Supreme Court of Judicature Act, 1873, s. 34, par. (3).

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 sub-s. (2); *Mostyn v. West Mostyn Coal & Iron Co., Ltd.*, 1 C. P. D. 145; *Breslauer v. Barwick*, 24 W. R. 901; *Storey v. Waddell*, 4 Q. B. D. 288; *Guthrie v. Smith*, 7 Q. B. D. 626.

state voidable (*g*) at the option of such person (*h*).^{How far binding.} Thus, in *Pitt v. Smith* (*i*), where to an action for libel, in stating that the plaintiff had induced the defendant to execute an agreement in a state of intoxication, the general issue was pleaded, and evidence given under it to show that defendant was in a complete state of intoxication when he executed it, a non-suit was directed by Lord *Ellenborough*, who said, "You have alleged that there was *an agreement* between the parties, and this allegation you must prove, as it is put in issue by the plea of *not guilty*; but there was no agreement between the parties if the defendant was intoxicated in the manner supposed when he signed this paper. He had not *an agreeing mind*." It seems to have been held, formerly, that the intoxication of one of the contracting parties, to invalidate the contract, must have been known to the other party (*k*); and *semble* this is still the law in a case of *partial* intoxication, where it is sought to enforce an executory contract (*l*). Where, in a suit for specific performance of an agreement, the defence set up was incapacity at the time of executing it, on the ground of intoxication, it was held that the mere intoxication, *without fraud*, was not sufficient ground for getting rid of the agreement (*m*). Under any circumstances, however, the contract of a drunken man is voidable only, and not absolutely void,

(*g*) *Gore v. Gibson*, 13 M. & W. 623; *Molton v. Camroux*, 4 Exch. 17, 19; *Butler v. Mulvihill*, 1 Bligh, 137; *Hawkins v. Bone*, 4 F. & F. 311.

(*h*) *Mathews v. Baxter*, L. R. 8 Exch. 132. The Insane and the Law, by Pitt-Lewis, Smith, and Hawke, p. 154.

(*i*) 3 Camp. 33.

(*k*) *Johnson v. Medlicote*, cited 3 P. Wms. 130; *Cooke v. Clayworth*, 18 Ves. 12.

(*l*) The Insane and the Law, by Pitt-Lewis, Smith, and Hawke, p. 154. Byles on Bills, 15th ed., p. 70.

(*m*) *Shaw v. Thackray*, 17 Jur. 1045; 1 Sm. & G. 537; *Lightfoot v. Heron*, 3 Y. & C. 586; *Butler v. Mulvihill*, 1 Bligh, 137; *Cooke v. Clayworth*, 18 Ves. 12.

and therefore becomes binding if adopted by him after he is sober (*a*).

Duress a
guarantee for
avoiding
contracts.

Guarantee
obtained by
void.

Contracts entered into by persons under a constraining force are voidable, on the ground of duress, and the courts will not allow a guarantee given under such circumstances to be taken advantage of (*b*). This is because persons entering into them, under such circumstances, are not in a state in which they can form that necessary intention without which no contract can be made. Thus, duress by imprisonment will avoid a contract. To constitute this, it seems that either the imprisonment or the duress that is offered in prison must be tortious and unlawful (*c*). Duress by threat will also sometimes be sufficient to avoid a contract. No threat will, however, be sufficient to constitute such duress unless it amount to a threat of *personal* restraint or injury, though the fear need not be such as would impel a person of ordinary courage and resolution to yield to it (*d*).

Duress of
goods will not
invalidate a
contract.

Again, duress of *goods* will not invalidate a contract (*e*). Thus in *Skate v. Beale* (*f*), Lord Denman said, "We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and with regard to the former, the law is laid down in 2 Inst. 483, and Sheppard's Touchstone, p. 61, and the distinction pointed out between duress of or menace to the person, and duress of goods. The

(*a*) *Mathews v. Baxter*, L. R. 8 Exch. 132.

(*b*) Per KINDERSLEY, V.C., in *Small v. Currie*, 2 Drew. 102, 114; and see *Williams v. Bayley*, L. R. 1 H. L. 200; 35 L. J. Ch. 717; *McClatchie v. Haslam*, 17 Cox. C. L. C. 402.

(*c*) Bacon, Abr., Duress, A. (*d*) *Scott v. Sebright*, 12 P. D. 21, 24.

(*e*) *Atter v. Buckhouse*, 3 M. & W. 633, 650; *Astley v. Reynolds*, 2 Str. 915; *Sumner v. Ferryman*, 11 Mod. 202; and see *Liverpool Marine Credit Co. v. Hunter*, L. R. 3 Ch. App. 487; 37 L. J. Ch. 386.

(*f*) 11 Ad. & Ell. 983, 990; 3 P. & D. 597; 4 Jur. 766.

former is a constraining force, which not only takes away *the free agency*, but may leave no room for appeal to the law for a remedy : a man, therefore, is not bound by the agreement which he enters into under such circumstances ; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."

The duress that will avoid a contract must, as a rule, be exercised upon one of the contracting parties personally (*g*). Thus, duress to a third person, though a servant of the contracting party, will not avoid a master's contract or *vice versa* (*h*). However, duress to a son will, it seems, avoid the father's deed, and *vice versa* (*i*). So, also, duress to the wife will avoid the husband's contract (*k*). Under certain circumstances, duress on a person will avoid the contract of such person, though entered into for him *by an agent* (*l*). Upon whom duress must be exercised to avoid a contract.

Duress by a stranger, if at the instance of the party who will reap the benefit of it, is a good ground for invalidating a contract (*m*). By whom.

A contract entered into under duress being merely voidable, if it be voluntarily acted upon by a party to it, with a knowledge of all the facts, he cannot avoid it when the result has turned out to his disadvantage (*n*). Contract obtained by duress voidable only, not void. Moreover, such a contract is clearly available to the

(*g*) Bac. Abr., Duress, B., and Roll. Abr. 687.

(*h*) *Ib*.

(*i*) *Ib.*, 1 Roll. Abr. 687, pl. 6, c ; but see Story on Contracts, 5th ed., vol. i., p. 469, note (*q*).

(*k*) Bac. Abr., Duress, B., and Roll. Abr. 687.

(*l*) *Cumming v. Ince*, 11 A. & E. 112. Every agent, it may be mentioned, is personally liable to repay money which he has obtained by duress. *Snowdon v. Davis*, 1 Taunt. 359. *Aliter*, where he has not himself been guilty of duress, and has paid the money over in ignorance that it was obtained by duress. *Owen v. Cronk*, (1895) 1 Q. B. 265.

(*m*) Roll. Abr. 688.

(*n*) *Ormes v. Beadel*, 30 L. J. Ch. 1 ; 2 De G. F. & J. 333.

party suffering the duress, and against the party inflicting the same (a).

Contracts by infants.

Infants labour under a qualified incapacity to contract.

Disability of infants to contract except for necessities.

By the *English common law*, all persons under the age of twenty-one are infants, and, as such, they are altogether disabled from contracting, except in the case of necessities and of acts in their nature beneficial to themselves (b). But formerly an infant might, on attaining his majority, have *ratified* previous contracts entered into by him (c). Now, however, it is provided by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), that all contracts entered into by infants, whether by specialty or by simple contract, except for necessities, which were formerly voidable only, shall be void and incapable of ratification. The object of this statute would seem to have been to restore the law for the protection of infants, upon which judicial decisions were considered to have imposed qualifications (d). It does not, however, when an infant has paid for something, and has consumed or used it, entitle him to recover back the money which he has paid, as this would be contrary to natural justice (e).

Their contracts now incapable of ratification.

What are necessities.

As regards contracts for necessities, the term necessities is a relative one, and its meaning varies

(a) Chitty on Contracts, 13th ed., p. 200.

(b) *Burglart v. Angerstein*, 6 C. & P. 690; 1 M. & R. 458; *Mcakin v. Morris*, 12 Q. B. D. 352.

(c) Lord Tenterden's Act (9 Geo. 4, c. 14) enacts by s. 5 that no action shall be maintained whereby to charge any person, upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. This section is, *seemingly*, impliedly repealed by s. 2 of the Infants Relief Act, 1874. See Chitty's Statutes, 5th ed., vol. v., title "Infants and Children," p. 20, note (k).

(d) *Valentini v. Canali*, 24 Q. B. D. 166.

(e) *Ib.*

with the rank and fortune of the infant (*f*). It has recently been decided that articles of mere luxury cannot be necessities suitable to the condition of any infant, but articles of utility, though luxurious and expensive, may be (*g*). Where an infant is sued for the price of goods supplied to him on credit, he may, for the purpose of showing that they were not necessities, give evidence that, when the order was given, he was already sufficiently supplied with goods of a similar description, and it is immaterial whether the plaintiff did or did not know of the existing supply (*h*). It is now provided by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2, that when necessities are sold and delivered to an infant or minor he must pay a reasonable price therefor, and that necessities in this section mean goods suitable to the condition in life of such infant or minor, and to his actual requirements at the time of sale and delivery. Though a contract with an infant is voidable by him, yet it cannot be avoided by the opposite party (*i*).

By the *English common law*, a married woman could not, as a rule, bind either herself or her husband by any contract she might enter into. This incapacity to contract has been greatly mitigated by modern statutes, commencing with the Married Women's Property Act, 1870, and ending with the Married Women's Property Act, 1893. Section 1, sub-s. (2) of the Married Women's Property Act, 1883 (the main object and purport of which is to give a married woman certain rights as

Contracts by married women.

Changes effected in wife's power of making contracts by the Married Women's Property Acts.

(*f*) *Peters v. Fleming*, 6 M. & W. 42; *Hands v. Slaney*, 6 T. R. 578; *Harrison v. Fane*, 1 Scott, N. R. 287; 1 M. & G. 550; 4 Jur. 508; *Wharton v. Mackenzie*, 5 Q. B. 606; *Brayshaw v. Eaton*, 7 Scott, 183; *Walter v. Everard*, (1891) 2 Q. B. 369.

(*g*) *Ryder v. Wombwell*, L. R. 3 Exch. 90; *S. C.*, L. R. 4 Exch. 32.

(*h*) *Barnes & Co. v. Toye*, 13 Q. B. D. 410.

(*i*) *Warwick v. Bruce*, 2 M. & S. 205; *Zouch v. Parsons*, 3 Burr. 1794.

between her and her husband (a)), provides that a married woman shall be capable of holding property, and of contracting to the extent of her separate property, as a *feme sole* (b); whilst s. 12 of the same statute in effect provides that every married woman, whether married before or after the Act, shall have in her own name, against all persons whomsoever, including her husband, the same civil remedies, and, with one exception, the same redress by way of criminal proceedings, for the protection and security of her own separate property as if such property belonged to her as a *feme sole* (c). Moreover, it is now provided by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1, which repeals sub-s. (3) and (4) of s. 1 of the Married Women's Property Act, 1883, that every contract entered into by a married woman, otherwise than as agent; (a) shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time she enters into such contract; (b) shall bind all

(a) *Per* KAY, J., in *In re Jupp, Jupp v. Buckwell*, 39 Ch. D., at p. 151. These Married Women's Property Acts do not, however, altogether alter the legal status of husband and wife, who, in the eye of the law, are still one person for purposes outside the Married Women's Property Acts. *In re Jupp, Jupp v. Buckwell*, *supra*; *Butler v. Butler*, 14 Q. B. D. 831, 835; *S. C.*, 16 Q. B. D. 374; *Thorley v. Thorley*, (1893) 2 Ch. 229; *In re March*, 27 Ch. D., at p. 170; *per* COTTON, L.J.,—but see *In re Gue* (1892), W. N. 88.

(b) This section is not retrospective. See *Conolan v. Leyland*, 27 Ch. D. 632; *Turnbull v. Forman*, 15 Q. B. D. 234, C. A. The *personal* liability of a married woman at common law upon contracts made by her *before* marriage is not taken away by the Married Women's Property Act, 1882—*Robinson, King & Co. v. Lynes*, (1894) 2 Q. B. 577.

(c) For instance of a case in which guarantee was given by a married woman, see *Morrell v. Cowan*, 7 Ch. D. 151; 26 W. R. 90; 47 L. J. Ch. 173; 37 L. T. 586; see also *Davies v. Jenkins*, 6 Ch. D. 728.

separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to. This enactment removes the difficulty previously experienced by plaintiffs in proving that when the contract was entered into the married woman sued was possessed of separate estate (d).

The incapacities to contract, which have hitherto been mentioned, rest on the want of power to produce the necessary intention to contract. There are, however, others which rest on different principles, originating in motives of *public policy*, and which perhaps it may be as well to mention in this place. By the common law, all *alien enemies*, and all British subjects and subjects of neutral nations domiciled in an enemy's territory, or engaged in the service of a hostile power, are disabled from contracting with British subjects unless they have obtained a license to trade (e). But they may lawfully provide for the wants and necessities of Englishmen detained abroad, and may enforce contracts made for such purposes on the return of peace (f). *Alien friends*, by the common law, labour under this partial incapacity to contract—namely, that they cannot lawfully enter into or enforce any contracts connected with the acquisition and enjoyment of freehold estates (f). *Prisoners of war* seem, by the common law, to possess the same contracting power as *alien friends* (f).

Incapacity to contract on grounds of public policy.

Alien enemies.

Alien friends.

The Naturalization Act, 1870 (g), amended by the Naturalization Act, 1895 (58 & 59 Vict. c. 43), has

Naturalization Act, 1870.

(d) See *Leak v. Driffild*, 24 Q. B. D. 98; *In re Shakespear*, 30 Ch. D. 169.

(e) Addison on Contracts, 9th ed., p. 93, 407.

(f) *Ib.* 407.

(g) 33 & 34 Vict. c. 14.

effected considerable alterations in the capacity of aliens as to property, it being enacted by s. 2 of that Act, that "real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject." No distinction appears to be made by this Act between alien friends and alien enemies, or between aliens residing in the country and those who do not. All aliens, therefore, would seem to enjoy the *express* power conferred by s. 2, as to taking, acquiring, and disposing of property, and the *implied* power conferred by that section, without which the express power would be almost useless,—namely, of entering into contracts for the taking, acquiring and disposing of real and personal property (*a*).

Incapacity to contract of felons and outlaws.

Felons and outlaws are incapable of contracting (*b*). But the Act abolishing forfeitures for treason and felony enables the Crown to appoint administrators of convict's property, in whom the convict's property shall vest, and with absolute power to let, mortgage, sell, convey and transfer any part of such property (*c*).

Third requisite of contract of guarantee. The consideration.

Thirdly, we now pass on to another requisite of a contract—the consideration.

Every contract not under seal must have a consideration to support it (*d*). This consideration is either expressed in words, or implied from the very nature of the contract. It is implied in the case of bills or notes, it being a presumption of law that every bill or note, whether expressed or not to be for value received, was given for adequate consideration, which therefore need neither be alleged nor proved by the

(*a*) See Chitty on Contracts, 13th ed., p. 190.

(*b*) See Addison on Contracts, 9th ed., p. 408; and see 33 & 34 Vict. c. 23, s. 8; and *Ex parte Graves, In re Harris*, 19 Ch. D. 1, C. A.

(*c*) 33 & 34 Vict. c. 23, ss. 9, 10, 12.

(*d*) See recent case of *Underwood v. Underwood*, (1894) P. 204, C. A.

holder in suing on the instrument (e). However, want of consideration is a defence in an action between the immediate parties. Contracts under seal or specialties not only are valid without any expressed consideration, but are valid without any consideration at all (f). The reason why a contract under seal is valid without consideration is because an engagement of this description is of so solemn a character that persons entering into it must be presumed to have previously determined upon what they were about to do (g).

Though, however, a contract under seal requires no consideration to support it, yet if it be founded on an illegal consideration, this will render the contract void (h). It would *seem*, too, though this has never been actually decided, that the *total failure* of a consideration obviously intended to exist would afford a good defence to an action on instrument under seal (i).

The contract of guarantee, like every other contract, requires a consideration to support it, unless it be under seal (k). This was decided in the case of *Barrell v.* Guarantee not under seal requires a consideration.

(e) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30, which is declaratory of and digests the law on this subject. This Act, when unambiguous, defines what the law is, and it is therefore of very little use to enquire whether it alters or adopts the law which existed up to the time when it passed—*per* WILLS, J., in *Clutton & Co. v. Attenborough*, (1895) 2 Q. B., at p. 313; *Bank of England v. Vagliano*, (1891) A. C. 107.

(f) *Fallowes v. Taylor*, 7 T. R. 475; Chitty on Contracts, 13th ed., p. 4.

(g) See *per* Earl of SELBORNE, L.C., in *Foakes v. Beer*, 9 App. Cas., at p. 613; *Morley v. Boothby*, 3 Bing. 107, 111; *Sharington v. Pledall*, Plowd. 308.

(h) *Featherstone v. Hutchinson*, Cro. Eliz. 199, 200; *Pearce v. Brooks*, L. R. 1 Ex. 213; *Blachford v. Preston*, 8 T. R. 89; *Fisher v. Bridges*, 3 Ell. & Bl. 642, 649; *Bunn v. Guy*, 4 East, 190, 200; *McClatchie v. Haslam*, C. A. (1891), W. N. 191.

(i) See *Rose v. Poulton*, 2 B. & Ad. 822, 828; *Bunn v. Guy*, 4 East, 190.

(k) The consideration need not now be stated in writing. See *post*, Chapter III.

Trussell (a). There it was contended at the bar that a promise to answer the debt of another, if in writing, did not require any consideration to support it. The court, however, observed, that in all cases to make any promise valid, whether to pay the debt of another or to do anything else, there must be a consideration for it, whether it be in writing or not in writing.

Nature of the
consideration
for a
guarantee.

No court of law has ever decided that there must be a consideration moving *directly* between the person giving and the person receiving a guarantee; it is enough if the person for whom the guarantee is given thereby receive a benefit or advantage; or if the party to whom it is given suffer a detriment or inconvenience, to form an inducement to the surety to render himself liable for the debt of the principal (*b*). Owing to the circumstance that, usually, persons by giving guarantees benefit third persons rather than themselves, it seems to have been assumed in some cases, that where the person giving a guarantee derived any *apparent benefit* from it the whole character of the transaction was altered. These cases will be discussed hereafter, when we come to treat of the operation of the Statute of Frauds upon guarantees. In the case of *Ex parte Minet (c)*, Lord *Eldon* is reported to have said, "that the undertaking of one man for the debt of another does not require a consideration moving between them." Now, certainly, such a statement requires explanation.

(a) 4 Taunt. 117, 120. See also *per* ABBOTT, C.J., and BAYLEY, J., in *Saunders v. Wakefield*, 4 B. & Ald. 595, 600, 601; *Pillan v. Van Mierop and Hopkins*, 3 Burr. 1663 (where the whole subject of *consideration* is learnedly and fully discussed); *French v. French*, 2 M. & Gr. 644; *Westhead v. Sprason*, 30 L. J., Ex. 265, 267; *Boyd v. Moyle*, 2 C. B. 644, 650.

(b) *Per* BEST, C.J., in *Morley v. Boothby*, 19 Moore, 395, 406; *per* BOWEN, L.J., in *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D., at p. 289. See also judgment of YATES, J., in *Pillan v. Van Mierop and Hopkins*, 3 Burr. 1663.

(c) 14 Ves. 189.

If it means that the consideration for a guarantee may consist of a *detriment* to the person to whom the guarantee is given, or what is really the same thing, of a *benefit* conferred by the latter on the principal debtor, why then the statement in question is undoubtedly good law. If, however, Lord *Eldon* meant to say that the existence of a debt between A. and B. is *of itself* a sufficient consideration for a guarantee of C., then, certainly, he laid down that which is not the law. Thus, it appears from numerous cases that a promise to pay a debt already incurred by a third person, without the intervention of the defendant, is not binding unless made on some *new* consideration (*d*); for a *past* or *executed* consideration, unless moved at the defendant's request, is not binding without some new consideration. However, an agreement by the creditor that he will forbear to sue the principal debtor for a past debt is a sufficient consideration for the guarantee of the surety. And where the guarantee is given in consideration of the plaintiff undertaking to forbear to sue for a certain period, or when the nature of the transaction shows that this was the intention of the parties, forbearance to sue before the expiration of the period agreed upon is a condition precedent to the plaintiff's right of action on the guarantee (*e*). On the other hand, the mere fact of forbearance is not a consideration for a person's becoming a surety for a debt (*f*). There must be either a promise to forbear or else an actual forbearance at the request express or implied of the

Past or executed consideration insufficient.

Forbearance a good consideration.

Cases on this subject.

(*d*) See *French v. French*, 2 M. & G. 644; 3 Scott, N. R. 121; *Wood v. Benson*, 2 Cr. & J. 94; 1 Roll. Abr. 27, pl. 49; *Payne v. Wilson*, 7 B. & C. 423, 426; *Lyon v. Lamb*; cited in *Fell on Guarantees*, 2nd ed., 36—40; *Johnson v. Nicholls*, 1 C. B. 251; *Tomlinson v. Gell*, 6 Ad. & Ell. 564; *Thomas v. Williams*, 10 B. & C. 664; *Eastwood v. Kenyon*, 11 A. & E. 438; *Hunt v. Bate*, Dyer, 272a; *Broom v. Butchelor*, 25 L. J. Ex. 299

(*e*) *Rolt v. Cozens*, 18 C. B. 673.

(*f*) Per Lord ESHER, M.R. in *Crears v. Hunter*, 19 Q. B. D. at p. 344.

defendant (a). It was formerly thought that forbearance to sue for an *indefinite* period was not such a consideration as could support a guarantee, unless, indeed, in those cases where a particular act had to be done which required some time to do it, and in which the law implied a *reasonable* time (b). Thus forbearance *per paullulum tempus*, or for *some* time, was held bad (c); though forbearance *per magnum tempus* (d), or for a *reasonable* time (e), which seems certainly to be equally *indefinite*, was held good. These distinctions, however, no longer exist. Again in *Ross v. Moss* (f), which it will be seen presently has been very much questioned, it was held that the mere discontinuance of an action is not a sufficient consideration to support a promise, because the plaintiff may commence a *fresh* action the next day. On the other hand where the defendant, in consideration of the plaintiff having, at the defendant's request, consented to suspend proceedings against A., promised to pay a certain sum on account of the debt "on the 1st day of April now next," it was held, that the consideration of the promise must be taken as a consent to suspend proceedings *at least until the 1st of April* (g). In the case of *Harris v. Venables* (h), the case of *Ross v. Moss* (*supra*) was questioned. In *Harris v. Venables*, the plaintiff having presented a petition for winding up a company, the defendant signed the following guarantee: "In consideration of

(a) *Per Lopes, L.J.*, in *Crears v. Hunter*, 19 Q. B. D., at p. 346.

(b) *Simple v. Pink*, 1 Exch. 74; *Elkins v. Heart*, Fitzg. 202; *Payne v. Wilson*, 7 B. & C. 423.

(c) 1 Roll. Abr. 23, pl. 26; *Sackford's Case*, Cro. Eliz. 455.

(d) *Mapes v. Sidney*, Cro. Jac. 683.

(e) *Johnson v. Whitchcott*, 1 Roll. Abr. 24, pl. 33.

(f) Cro. Eliz. 569.

(g) *Payne v. Wilson*, 7 B. & C. 423.

(h) L. R. 7 Exch. 235; and see *Alhusen v. Prest*, 6 Exch. 720; 20 L. J. Ex. 404.

your withdrawing the petition you have presented for winding up the company called John King & Co., Limited, we agree to pay you all the costs you have incurred of and in relation to such petition, and to indemnify you against all costs (if any) you may be liable to pay to the company, or to any other parties appearing for or in reference to the petition. We further agree to guarantee the payment to you, within eighteen months from this date, by the company or the liquidator thereof, of the principal of your debt of 722*l.*” It was held, that the consideration applied to both promises, that the consideration was the withdrawal of the then pending petition and not the forbearing for eighteen months to proceed with any petition to wind up the company, and that such a consideration was sufficient to support the promise. Baron *Bramwell*, in the course of his judgment, said, “First Mr. *Trevelyan* (i) says, ‘withdraw’ means ‘not to present or persevere in a petition against the company for the space of eighteen months,’ and he says it must mean this, because if it only meant that the plaintiff would withdraw his petition for the moment, there would be no consideration and no valid contract. For this position he cites *Ross v. Moss*, which certainly goes very far; but whether that case is good law, and would be decided in the same way now, I will not say. If a man expressly contracts that, a particular petition being withdrawn, he will pay a sum of money, that is a good contract; it was his own folly not to provide against another petition being filed. It is obvious that a real benefit is gained by the withdrawal, because of the disinclination to commence a new proceeding after so much labour and expense have been wasted. I cannot but doubt, therefore, whether *Ross v. Moss* is good law; and I think that a promise made in consideration of

(i) The counsel for the plaintiff.

such an agreement would be good" (a). In this same case of *Harris v. Venables*, in speaking of *Semple v. Pink* (b) (in which the court seems to have thought that forbearance for an indefinite period is *bad*), *Cockburn*, C.J., said, "But supposing that the sole consideration was the forbearing to press for immediate payment, I should not be prepared to assent to the doctrine laid down in *Semple v. Pink*;" and *Erle*, J., said, "I concur with the Lord Chief Justice with respect to the case of *Semple v. Pink*. I do not assent to the doctrine that a guarantee in consideration of an agreement to give time is void, unless the time to be given is defined in the contract." In the modern case of *Wynne v. Hughes* (c), disapproval of the doctrine laid down in *Semple v. Pink* was expressed by the court, and its authority doubted.

Discontinu-
ance of an
action will
afford
consideration
for a
guarantee.

Also for-
bearance for
an indefinite
period.

It may, perhaps, be laid down as a safe rule, that discontinuance of an action or other proceeding is a sufficient consideration to support a guarantee, notwithstanding the risk which the promiser runs of commencement of fresh proceedings immediately after the discontinuance of the old proceedings; but that forbearance to sue for an *indefinite* period, where there is no proceeding pending, is also a good consideration, because it always means forbearance for a reasonable time, and that what is a reasonable time must be left to the jury (d). This construction of a forbearance for an indefinite period is in accordance with decisions in the analogous cases of guarantees given in consideration of past and future supply of goods; and where it seems to have been held that the future supply must be *reasonable* to support the promise of the surety where the instrument is silent as to the *extent* of such a

(a) See recent case of *Beer v. Foakes*, 11 Q. B. D. 221.

(b) 1 Exch. 74.

(c) 21 W. R. 628.

(d) *Per* COCKBURN, C.J., in *Oldershaw v. King*, 2 H. & N. 517, 520.

supply (e). In *Oldershaw v. King* (f), where the guarantee was given in consideration of forbearance to press for *immediate payment*, the court expressed the opinion that this amounted to an agreement to forbear for a reasonable time, and that this, of itself, would be sufficient to support a guarantee. As, however, in that case the contract disclosed a sufficient consideration, independently of such forbearance, it became unnecessary actually to decide the point. It would seem from the judgment of Lord *Esher*, M.R., in the recent case of *Crears v. Hunter* (g), that what was laid down in *Oldershaw v. King*, *supra*, is good law and in accordance with decided cases. In *Wynne v. Hughes* (h) the facts were as follows:—The plaintiff's agent wrote to defendant, "I have this morning received the most peremptory instructions to settle this account. Be good enough to arrange something by to-morrow." The defendant in reply wrote, "I undertake to pay 500*l.* on the account between my late brother, Mr. O. D. Hughes, and your client on or before this day three weeks." The plaintiff did not expressly agree to forbear suing, but did in fact forbear for three weeks. It was held that the correspondence, together with the plaintiff's actual forbearance for three weeks to sue, constituted a good and binding promise to pay on the part of the defendant. This case, strangely enough, was not cited in the very recent case of *Crears v. Hunter*, (i) though it is a direct authority for what was there decided, namely, that forbearance at another's request, without any binding undertaking to forbear, is a sufficient consideration for the promise of a surety.

(e) See *infra*.

(f) 2 H. & N. 517 ; and see observations of BRAMWELL, B., on this case in *Wynne v. Hughes*, 21 W. R. 628, 629 ; see also *Hinton v. Paddison*, 68 L. T. 405.

(g) 19 Q. B. D. at p. 344.

(h) 21 W. R. 628.

(i) 19 Q. B. D. 341, C. A.

Where certain goods were seized by A. under a warrant from the sheriff, in the belief that they were goods of the debtor, and, upon the goods being claimed by the debtor's brother, the plaintiff, at the request of the defendant, disregarded the claim and sold the goods, in consideration of his doing which the defendant promised to indemnify him, the consideration was held to be sufficient (a). If a serious claim is made against a person, its abandonment constitutes a good consideration for a contract of guarantee (b). Where, however, a guarantee is given in the expectation that, by giving it, the taking of certain legal proceedings will be obviated, but there is no binding contract, on the part of the person to whom the guarantee is given, not to take such proceedings, there is no sufficient consideration (b). There must, it seems, be something binding the person to whom the guarantee is given not to institute proceedings which, in fact, he intended to institute (b). In the case of an individual a representation made by him that if the guarantee be given he will take no proceedings would suffice, as this would amount to a binding contract, but in the case of a public company there ought to be some more formal proceedings either by the action of the directors sitting as such or by something equivalent to a resolution of the shareholders in general meeting (b).

Executory
consideration
for a
guarantee.

A promise of guarantee is sufficiently supported by a *future* or *executory* consideration. Thus, an agreement by the plaintiff for the *future* supply of goods, or for a *future* advance, to a third person, is a sufficient consideration for the defendant's promise to be answerable for the payment to the plaintiff of *past* and *future* debts of such third person (c). So also a

Examples.

(a) *Elliston v. Berryman*, 15 Q. B. (N.S.) 205.

(b) *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266, 283, 285, 286, 300.

(c) *White v. Woodward*, 5 C. B. 810; *Chapman v. Sutton*, 2 C. B. 634; *Boyd v. Moyle*, 2 C. B. 644; *Russell v. Moseley*, 3 B. & B. 211. In

contract by the surety to be answerable for all goods that *may* be supplied is not bad for want of consideration because there is no obligation to supply the goods, though it is revocable till acted upon (*d*). Where, however, there is no agreement binding on the plaintiff to supply the goods, and no goods are in fact supplied, the guarantee fails for want of consideration (*e*). Moreover, it seems that the supply must be *bonâ fide*, and to a reasonable extent, and this question is for a jury to determine (*f*). Subject, however, to this condition, the amount to be supplied may be discretionary (*g*). Where it is evident that the future supply is to be on the same terms and of a character similar to the past supply, the plaintiff will not be entitled to recover on the guarantee unless it appear that this condition has been fulfilled (*h*). A promissory note given by a principal and his surety for a definite sum and payable on a fixed day is presumed to be given in consideration of an advance at the date of the note; and if the payee asserts, as against the surety, that the object of the note was to secure the payment of the balance of an account current between the principal and the payee of the note, the burden of proof lies on the payee(*i*).

Future
advance or
supply of
goods.

the same way a man who tenders for the supply of goods at certain fixed prices is bound to deliver them when an order is given, though there is no binding contract by the person receiving the tender to give such order. *Great Northern Railway Co. v. Witham*, L. R. 9 C. P. 16.

(*d*) *Post*, p. 30; and see *Great Northern Railway Co. v. Witham*, L. R. 9 C. P. 16.

(*e*) *Westhead v. Sproson*, 6 H. & N. 728; *Boyd v. Moyle*, 2 C. B. 644, 650.

(*f*) *Johnson v. Nicholls*, 1 C. B. 251; *White v. Woodward*, 5 C. B. 810, 818; *Broom v. Batchelor*, 1 H. & N. 255—264; *Wood v. Benson*, 2 C. & J. 94.

(*g*) *White v. Woodward*, *ubi supra*.

(*h*) *Johnson v. Nicholls*, *supra*.

(*i*) *In re Boys*, *Eades v. Boys*, *Ex parte Hop Planters Co.*, L. R. 10 Eq. 467.

Future
employment
of third
persons.

Promises to be answerable for the behaviour of third persons in offices or employments are not invalid for want of consideration, merely because the promisee is not bound to employ such persons (a). These promises greatly resemble promises to be answerable for future supplies or advances made to third persons (b). In *both* cases the guarantees are not *mutually* binding *at first*, and are therefore revocable until the employment in the *one* case, and the supply or advance in the *other* (c). Thus, in *Offord v. Davies* (d) it was held, that a guarantee to secure moneys to be advanced to a third person on discount, to a certain extent, "for the space of twelve calendar months," is countermandable within that time, *before it has been in any way acted upon*. Erle, C.J., in his judgment in this case, says: "The promise, by itself, creates no obligation. It is, in effect, conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants, or the detriment of himself. But until the condition has been *at least in part* fulfilled, the defendants have the power of revoking it (e). In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted upon did not appear to be disputed. Then, are the rights of the parties affected, either by the promise being expressed to be for twelve months, or by the fact that some discounts have been made before that now in question and repaid? We think not. The promise to repay for twelve months creates no additional liability on the guarantor; but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And with

(a) *Kennaway v. Treloar*, 5 M. & W. 498; *Lysaght v. Walker*, 5 Bligh (N.S.) 1; *Newbury v. Armstrong*, 6 Bing. 201.

(b) See *ante*, p. 29.

(c) See *post*, Chapter VI.

(d) 12 C. B. (N.S.) 748.

(e) As to revocation of guarantees, see *post*, Chapter VI.

respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made and no more."

It has already been pointed out that a *past* or *executed* consideration is insufficient to support a promise of guarantee, but that an *executory* or *future* consideration is quite sufficient for the purpose. Now, it is very often by no means easy to determine whether, according to the fair interpretation of the words of a guarantee, the promise of the surety is given for a past or an executed consideration, such as past advances to the original debtor, or for a future or executory consideration, such as future advances. Where the words of a guarantee are capable of expressing either a past or a concurrent consideration, the courts will adopt the latter construction, *ut res magis valeat quam pereat* (*f*). If, however, it should appear that the parties did not necessarily contemplate future advances, the guarantee will be void (*g*). Also, if the consideration for the promise is expressed to be past and future advances, whereas, as a *fact*, the consideration is *entirely* past or executed, and not moved by a precedent request, it is certainly invalid (*g*). It seems that if the expression of the parties is ambiguous, *parol* evidence is admissible to show that the parties meant not a past but a future supply of goods (*h*). In *Edwards v. Jevons* (*i*), the

Difficulty in some cases of determining whether consideration alleged is past or future.

(*f*) *Steele v. Hoe*, 14 Q. B. 431; *Edwards v. Jevons*, 8 C. B. 436; *Broom v. Batchelor*, 1 H. & N. 255; *Goldshede v. Swan*, 1 Exch. 154, *Colbourn v. Dawson*, 10 C. B. 765.

(*g*) *Bell v. Welch*, 9 C. B. 154.

(*h*) *Hoad v. Grace*, 7 H. & N. 494. Taylor on Evidence, 9th ed., vol. ii., p. 786—787; Powell on Evidence, 6th ed., p. 474.

(*i*) 8 C. B. 436.

expression, in consideration "of your *giving* credit," was held to be equally applicable to future as to past advances. In *Haigh v. Brooks* (a), the words used were, in consideration "of your being in advance," and these were held not to necessarily imply a past advance. So it appears that the words "having released" may be *prospective* (b), and the words "having resigned" were held equally to import either a *past* or a *concurrent* consideration (c). In *Coles v. Pack* (d), an agreement to become responsible for any sum of money "*for the time being*" due, was treated as including a liability for *future* indebtedness.

In *Broom v. Batchelor* (e), the guarantee was as follows: "In consideration of the credit given by B. to E., I hereby agree to guarantee the payment of all bills of exchange drawn by the said B. and accepted by E. Also, I hereby agree to guarantee the payment of any balance that may be due from the said E. to the said B. This guarantee to include all bills of exchange now running, as well as the balance of account at this day." It appeared that at the time of the giving of the guarantee there were bills running, and an account due from E. to B., and future dealings between the parties were contemplated. It was held that the guarantee extended to future as well as to past advances.

In *Brunning* (Pauper) *v. Odhams Bros.* (f) the following were the facts. The plaintiffs were the printers of a weekly paper called *Lux*, of which the defendant was the publisher. The defendant was also the managing director of the *Lux* Publishing Co., who were the proprietors of the paper. In June, 1895, the company being indebted to the plaintiffs in a consider-

(a) 10 A. & E. 309.

(b) *Butcher v. Stewart*, 11 M. & W. 857.

(c) *Steele v. Hoe*, 14 Q. B. 431.

(d) L. R. 5 C. P. 65.

(e) 1 H. & N. 255.

(f) 13 T. L. R. 65.

able sum of money for printing, and there being some doubt as to whether the expected number could be brought out, in order to induce the plaintiffs to print the fresh number the defendant gave the following guarantee, "If you will bring out the present number I will repeat my guarantee to see you paid in full." It was proposed at the trial to show by *parol* evidence that this written guarantee was given in substitution for a prior verbal guarantee in respect of the whole *past* debt. *Held*, however, by the House of Lords reversing the decision of the Court of Appeal, and of *Collins, J.*, that this evidence was inadmissible, and that, consequently, the guarantee must be limited to the expense of bringing out the *fresh* number of the paper and did not extend to *past* transactions.

In *Mockett v. Ames (g)*, the plaintiffs supplied the defendant's son with some beer, and on their refusing to supply more without a guarantee, the son gave them the following guarantee signed by the defendant: "I hereby undertake to pay you for all the beer supplied by you to the Star Brewery, 131, East Street, Walworth, on the completion of the purchase, which will take place in a few days." It was held, that the promise was *primâ facie* a promise to pay for goods to be supplied; and *semble*, that the promise also applied to the goods already supplied. In *Grahame v. Grahame (h)* the guarantee was as follows:—"7th February, 1879. I hereby undertake to guarantee to the National Bank any advances made to my son, Charles James Grahame, of the London Stock Exchange, to the extent of 1,000*l*." It was held that the guarantee was a continuing guarantee extending to advances made *after* its date, and that, moreover, the term "*advances*" was not confined to cash advances or overdrafts, but included proceeds of bills or notes

(g) 23 L. T. (N.S.) 729.

(h) 19 Ir. L. R. 249.

discounted by the bank and placed to the credit of C. J. Grahame.

Consideration for guarantee may be concurrent.

The consideration for the promise of the guarantor may be *concurrent* with such promise (a). It need not, however, be *co-extensive* with it (b), for the courts refuse to enforce a contract only where it is *nudum pactum*, that is to say, where there is an *absence* of consideration, not where the consideration is *inadequate* merely, for the law has nothing to do with the prudence or imprudence of the bargain (c). Thus, the delivering up of a worthless guarantee would be a good consideration for the promise of the guarantor, for an inadequate security may, from various motives which the courts will not inquire into, be a very good consideration (d). A guarantee given for an *illegal* consideration cannot, it is presumed, be enforced (e). Moreover, money deposited with his surety by the defendant in a criminal case to be retained until the expiration of the period for which bail was required, as an indemnity against the defendant's default, cannot be recovered from the surety, either before or after the expiration of the specified period, although such defendant has not committed any default and the surety has not, therefore, been compelled to pay the sum for which he became bound (f).

Guarantee cannot be supported by illegal consideration.

(a) *Butcher v. Stuart*, 11 M. & W. 857; *Goldshede v. Swan*, 1 Exch. 151.

(b) *Johnson v. Nicholls*, 1 C. B. 251. See, however, *Thomas v. Williams*, 10 B. & C. 664.

(c) *Per ERLE, J.*, in *Johnson v. Nicholls*, 1 C. B. 251, 272. See also observations of CRESSWELL, J., at pp. 251 and 271 of 1 C. B.; *Dutchman v. Tooth*, 7 Scott, 710; *Edwards v. Baugh*, 11 M. & W. 641.

(d) *Haigh v. Brooks*, 10 A. & E. 309.

(e) See the recent case of *Woolf v. Barker*, L. R. 1 Eq. 139; and see *Coles v. Strick*, 15 Q. B. 2.

(f) *Herman v. Jouchner*, 15 Q. B. D. 561; overruling *Wilson v. Strugnell*, 7 Q. B. D. 548, where it was held that money paid in pursuance of a contract contrary to public policy, which had *not* been executed, could be recovered back.

It was once thought that a *moral* obligation was in all cases a good consideration for a promise. In *Lee v. Mugeridge* (g), a feme covert, having an estate settled to her separate use, gave a bond for repayment by her executors of money advanced at her request on security of that bond to her son-in-law. After her husband's decease she wrote, promising that her executors should settle the bond. It was held, that the executors were liable on this promise of the testatrix. It is conceived that this case it not now good law, for it has been held that, except under circumstances presently to be noticed, a mere moral consideration is not sufficient to support a promise (h). In *Eastwood v. Kenyon* (i) the facts were as follows : The plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate, leaving the defendant's wife, an infant, his only child. The plaintiff had *voluntarily* expended his money for the improvement of the real estate while the defendant's wife was sole and a minor, and to reimburse himself borrowed money of one *Blackburn*, to whom he had given his promissory note. The defendant's wife, while sole, had received the benefit, and after she came of age assented to and promised to pay the note, and did pay a year's interest. After the marriage, the plaintiff's accounts were shown to the defendant, who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to *Blackburn*. The declaration, after alleging these facts, alleged that the defendant, in right of his wife, had received all the benefit, and in consideration of the premises promised to pay and discharge the amount of the note to *Blackburn*. It was held that, as the consideration disclosed by the

Insufficiency
of moral
considera-
tion.

(g) 5 Taunt. 36.

(h) *Littlefield v. Shee*, 2 B. & Ad. 811, 812; *Wennall v. Adney*, 3 B. & P. 247.

(i) 11 A. & E. 438.

declaration for the defendant's promise was a past benefit not conferred at the request of the defendant, the declaration was bad. Now here, no doubt, as well as in *Lee v. Muggeridge* (*supra*), there was a perfect moral consideration for the promise.

Exceptions
to rule that
moral
consideration
insufficient.

Though, as a rule, a *moral* consideration will not, as already pointed out, support an express promise, yet there are certain cases, which we will now proceed to notice, which are exceptions to the general rule. These exceptions are summed up in a learned note to the case of *Wennall v. Adney* (a) in the following words:—“ That an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law ; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision ” (b). Thus the contracts of infants, until the passing of the Infants Relief Act, 1874, were *voidable* only, and were capable of ratification by express promise after age, while those of married women, which prior to recent legislation were *void*, could not be revived by ratification. So, again, it was held that a contract which, for want of written evidence required by statute, could not be sued upon, might be revived by express promise, provided the statute did not render the contract *absolutely void* for want of written evidence (c). Again, where a person, having entered into a written guarantee and become liable upon it, *verbally* promised to make good such liability, after the Statute of Limitations had barred the right of action on the guarantee, it was held, that the subsequent promise

(a) 3 B. & P. 247, 249, 253.

(b) This note is cited with approval by Lord DENMAN, C.J., in *Eastwood v. Kenyon*, 11 A. & E. 438, 447.

(c) *Wilson v. Marshall*, 15 Ir. C. L. R. (N.S.) 466.

revived the right of action on the guarantee (*d*). Such a promise would not now, however, have this effect unless it were in writing (*e*).

It will be seen, in a subsequent chapter (*f*), that a surety is discharged from his obligation if the creditor binds himself to give time to the principal debtor. However, just as a subsequent promise may revive a right of action on a guarantee, when such right has been barred by the Statute of Limitations, so also it seems that if a creditor having given time to the principal debtor makes a demand on the surety and receives a promise from him, that is sufficient to sustain the demand, not as the creation of a *new*, but as the revival of an *old* debt (*g*).

Whatever may be the nature of the consideration for a guarantee it moves not from the principal debtor, but from the creditor. Consequently, even though the contract of guarantee be under seal, it does not extinguish the simple contract debt of the principal (*h*). For the surety does not discharge the obligation of the principal, but contracts another which is accessory to it (*i*).

No special form of words is necessary to the formation of a guarantee. But the parties must manifest their intention clearly. On this subject reference must be made to the very recent case of *Dane v. Mortgage Insurance Corporation* (*k*) where it was held by a majority of the Court of Appeal (Lord *Esher*, M.R. and *Lopes*, L.J. ; *Kay*, L.J. *dissenting*) that a document headed "*policy of insurance*," whereby the defendants

(*d*) *Gibbons v. McCasland*, 1 B. & A. 690.

(*e*) 9 Geo. 4, c. 14, s. 1.

(*f*) Chap. VI.

(*g*) Per Lord ELDON in *Mayhew v. Crickett*, 2 Swanst. 185, 192.

(*h*) *White v. Cuyler*, 6 T. R. 176, 177.

(*i*) Pothier on the Law of Obligations (Evans' Edition), vol. i., pp. 229, 230.

(*k*) (1894) 1 Q. B. 54, C. A.

guaranteed to the plaintiff the "assured" payment of a deposit with a bank in a colony, if the bank should make default in payment, is a contract of insurance, and not of suretyship. Again, the assignor of a lease, though liable on his express covenant to his lessor for the default of the assignee, is not in the position of a surety liable under a guarantee (a). Speaking generally, however, whoever is liable to pay the debt of another is, as between himself and the person primarily liable, a surety (b). The *common law* did not even require the contract of guarantee to be *in writing*, but received *parol* evidence of it. The 4th section of the Statute of Frauds (c), however, enacts that no action shall be brought whereby to charge a person upon any *special promise* to answer for the debt, default, or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. The effect of this enactment is not to render *verbal*

But the contract must be in writing as required by Statute of Frauds.

(a) *Per curiam* in *Baynton v. Morgan*, 22 Q. B. D. 74, 77, 80, 83, but see *per* PARKE, B., in *Humble v. Langston*, 7 M. & W. at p. 530.

(b) *Per* JESSEL, M.R., in *Imperial Bank v. London and St. Katherine's Dock Co.*, 5 Ch. D. at p. 200.

(c) 29 Car 2, c. 3. The following are the exact words of the 4th section, which, it will be seen, applies to various transactions:—"And be it further enacted, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any *special promise* to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract **or* sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(Sic.)

guarantees *void* (d), but to prevent their being *enforced* by action (e), or other proceedings (f). And it would seem that, whenever the Statute of Frauds requires written evidence of a contract, such evidence must exist before action brought (g).

Verbal guarantee no longer enforceable by action;

It would appear that where one of the parties to a contract has *fraudulently* omitted to reduce it into writing, he will not be allowed to cover his fraud by setting up the Statute of Frauds as a defence (h).

except where defendant by fraud prevents compliance with statute.

Many years after the passing of the Statute of Frauds, it was found that that portion of the 4th section which relates to guarantees was capable of being evaded in certain cases, to which it was obviously necessary that it should apply, in order to prevent the perpetration of those frauds and perjuries against which this enactment is undoubtedly levelled. The case of *Pasley v. Freeman* (i) inaugurated the evasion in question. There an action founded in tort for deceit was brought against the defendant for inducing the plaintiff to supply with goods *on credit* a man known to the defendant to have no means, and whom he falsely, fraudulently and deceitfully represented to the plaintiff to be a person safely to be trusted and given credit to. It was held that the action might be maintained. Now, here the foundation of the action was the false *verbal* affirmation of the defendant, and there can be no doubt that, if the

How this provision of Statute of Frauds formerly evaded.

Special promise treated as false representation and action framed in tort.

(d) *Post*, p. 48 *et seq.*

(e) Also formerly by suit in equity, see *per* Lord ELDON, in *Cooth v. Jackson*, 6 Ves. 12.

(f) *Laythorpe v. Bryant*, 2 Bing. N. C. 735, 747; *Crosby v. Wadsworth*, 6 East, 602—611; *Leroux v. Brown*, 12 C. B. at pp. 823—825; but see *Carrington v. Roots*, 2 M. & W. 248; *Reade v. Lamb*, 6 Exch. 130; 20 L. J. Ex. 161.

(g) *Lucas v. Dixon*, 22 Q. B. D. 357, C. A.; *Bell v. Bament*, 9 M. & W. 36; *Longfellow v. Williams*, 2 Peake, 225; but see *Fricker v. Thomlinson*, 1 M. & G. 772, 773.

(h) *Lincoln v. Wright*, 4 De G. & J. 16; *Davies v. Otty*, 35 Beav. 208; *Booth v. Turle*, L. R. 16 Eq. 182; *Haigh v. Kaye*, L. R., 7 Ch. 469.

(i) 3 T. R. 51.

action had not been shaped upon a *tort*, but upon a contract, treating the *verbal* affirmation as though it were a *special promise* to answer for the debt, default or miscarriage of another person, the court would have held that the plaintiff was precluded from recovering by the 4th section of the Statute of Frauds.

In *Lyde v. Barnard* (a), *Parke, B.*, says: "Since the case of *Pasley v. Freeman* it is well known, from some reported cases, and from others which have not found their way into the books, that a practice had grown up of fixing a person with the debt of another, by *parol* evidence of a representation as to solvency or trustworthiness of a third person, and proof that credit was given on the faith of that representation. The practice did not extend to *all* cases within the Statute of Frauds. That statute applies to a guarantee, for good consideration, for a debt *already contracted*, as well as where credit was to be given; but the evil existed only in those cases in which credit was subsequently given, on the faith of the representation made. In this respect the practice of bringing actions on such *parol* representations was an evasion of the Statute of Frauds."

Action for false representation no longer maintainable unless representation in writing.

Provision on this subject in 9 Geo. 4, c. 14, s. 6.

It seems that in these actions for false representations as to character and credit the plaintiff almost invariably succeeded. This remarkable fact induced Lord *Tenterden* to think that there was some latent injustice which required a remedy, and he accordingly framed the 6th section of 9 Geo. 4, c. 14 (b) (Lord *Tenterden's* Act), which enacts, "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given

(a) 1 M. & W. 101.

(b) Such was the origin of this enactment, according to *POLLOCK, C.B.*, in *Tatton v. Wade*, 18 C. B. 371, 381. See also observations of Lord *ABINGER, C.B.*, and *PARKE, B.*, in *Lyde v. Barnard*, 1 M. & W. 101, 114, 117.

concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon (c), unless such representation or assurance be made in writing, signed by the party to be charged therewith." Since this enactment, therefore, whether the action be *in tort*, for false representation, or *in contract*, on a special promise to answer for another's default or miscarriage, the defendant is not chargeable without *written evidence*. Where there are both *written* and *verbal* affirmations as to character of another, and credit is thereby obtained, an action will lie against the party who made these affirmations, if the *written* representation be a *material* part of the inducement which moved the plaintiff to give the credit (d). No action will, however, lie for a false representation unless the party making it *knows* it to be untrue, and makes it with the intention of inducing the party to act upon it, and the latter does so act upon it and sustains damage in consequence (e). It is not, however, necessary that the defendant should benefit by the deceit (f).

In *Haslock v. Ferguson* (g), an attempt was made to evade the 6th section of Lord Tenterden's Act, which, however, happily proved unsuccessful. There, the action was for money had and received, which form of action

Unsuccessful attempt to evade this enactment.

(c) Probably a mistake for "thereupon." See observations of PARKE, B., in *Lyde v. Barnard*, 1 M. & W. 101—115.

(d) *Wade v. Tatton*, 25 L. J. C. P. 240; see also *Tatton v. Wade*, 18 C. B. 371.

(e) *Behn v. Kemble*, 7 C. B. (N.S.) 260; see further, *Ashlin v. White*, Holt, 387; *Polhill v. Walter*, 3 B. & Ad. 114; and see 2 Sm. L. C., 6th ed., pp. 71, 88; notes to *Pasley v. Freeman*, 2 Sm. L. C., 10th ed., p. 64; *Chandelor v. Lopus*, *Ib.* p. 52, and notes thereto; *Corbett v. Brown*, 8 Bing. 33.

(f) *Pasley v. Freeman*, 3. T. R. 51; see also *Foster v. Charles*, 4 M. & P. 61; 6 Bing. 396; 7 Bing. 105.

(g) 7 Ad. & E. 86; see also *Clydesdale Bank v. Paton* (1896), A. C. 381.

is usually adopted whenever the defendant has received money which belongs to the plaintiff *ex æquo et bono* (a). The plaintiff's case was that B., through a false *verbal* representation of his credit made by H., under defendant's sanction, had obtained goods from the plaintiff, by the sale of which sums were raised by B., and handed over to the defendant in liquidation of certain debts due to him from B. These sums the plaintiff, therefore, sought to recover from the defendant. The plaintiff was, however, nonsuited, on the ground that, as there was no mode of fixing the defendant in this action, except through the medium of evidence as to representation of character, the statute 9 Geo. 4, c. 14, s. 6, applied. In short, in order to prove that the plaintiff was entitled, *ex æquo et bono*, to the money claimed, it was necessary to give in evidence the alleged false affirmation, and this could not be done, as it was not in writing. A rule for a new trial, which the plaintiff's counsel obtained in this case, was ultimately discharged.

What representations are within 9 Geo. 4, c. 14, s. 6.

With regard to the question what representations are within the statute, the following instances may be noticed :—A representation by the defendant that money might be safely lent to A. B., *because* the title deeds to an estate which A. B. had just bought were in the defendant's possession, and that nothing could be done without the knowledge of the defendant, and that the plaintiff would be safe in making the loan, is a representation as to the *ability* of A. B., within 9 Geo. 4, c. 14, s. 6. This was decided in *Swann v. Phillips* (b). Lord Denman, C.J., in his judgment, said, "That if the words spoken by the defendant amounted only to an assertion that the defendant, being in possession of the title deeds, would know what

(a) *Moses v. Macferlan*, 2 Burr. 1005.

(b) 8 Ad. & E. 457, 460, 461; see also *Turnley v. Macgregor*, 6 M. & G. 46; S. C., 6 Scott, N. R. 906.

A. B. was doing, the statute did not apply. If they meant that A. B. might be trusted, then they constituted a representation as to his credit and ability." *Littledale*, J., in his judgment in the same case, said: "The representation is entire; no one part can be separated from the rest. In the ordinary course of things, if a man states another to be a man of ability, he is asked why he says so; he may answer, 'Because he has had a legacy left to him,' by way of enforcing his representation as to the ability. Here the substance of the conversation is similar; the defendant says, 'You may trust him, and my reason for saying so is, that I know the estate which he has bought, and have his title deeds.' That is one entire representation concerning his credit."

An action cannot, it seems, be maintained against a trustee for a false representation, by *parol*, of the incumbrances effected on the trust fund by the *cestui que trust*, such a representation being within the statute (c). In *Turnley v. Macgregor* (d), a similar point was raised, though not decided. There the representation complained of was, that a certain claim which a third person alleged he had upon the Government would be sure to be paid. Where, as in this case, the representation is as to the condition or value of a particular part of a man's property, whether it relate to or concern "his character, conduct, credit, ability, trade or dealings," must depend upon the facts of each particular case (e).

A representation made by the defendant as to the credit and circumstances of a firm of which he is a member is a representation as to the credit of "another person" within the meaning of the statute

(c) *Per* Lord ABINGER, C.B., and GURNEY, B., diss. PARKE, B., and ALDERSON, B., in *Lyde v. Barnard*, 1 M. & W. 101; 1 Gale, 388.

(d) 6 Scott, N. R. 906; S. C., 6 M. & G. 46.

(e) See, on this subject, *Lyde v. Barnard*, 1 M. & W. 101.

9 Geo. 4, c. 14, s. 6 (a). The certification by a company of a transfer of shares placed upon such transfer is a representation as to the credit and ability of the transferor within the 6th section of Lord Tenterden's Act, and unless made under the seal of the company, is not binding upon them, though in writing (b).

To whom the representation must be made.

A question sometimes arises as to the person to whom the representation must be made, in order to render the defendant liable. Upon this point it has been decided that, in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation be made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby (c).

By whom it must be signed.

As to the signature of the representation in respect of which the action is brought, it is to be observed that the 6th section of 9 Geo. 4, c. 14, requires that the written representation shall be signed by the party to be charged. Consequently, the signature of an agent is not, it seems, sufficient, (d) because the enactment

(a) *Devaux v. Steinkeller*, 8 Scott, 202.

(b) *Bishop v. Balkis Consolidated Co.*, 25 Q. B. D. 77; S. C., *ib.* 512, C. A.

(c) *Pier QUAIN, J.*, in *Swift v. Winterbotham*, L. R. 8 Q. B. 244, 253. This case was reversed, on another point, by the Exchequer Chamber.

(d) *Swift v. Winterbotham*, L. R. 8 Q. B. 244, 249, in which the law as laid down in *Hyde v. Johnson*, 3 Scott, 289; 2 Bing. N. C. 776; and *Clark v. Alexander*, 8 Scott, N. R. 147 (which are decisions on the first section of 9 Geo. 4, c. 14, which section is in *pari materiâ* with section *sic* of the same statute, was approved of. However, these decisions on s. 1 of the Act are, owing to s. 13 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), no longer law, though the principles they enunciate are still applicable to s. 6 of the Act (9 Geo. 4, c. 14).

in question must be read along with the Statute of Frauds, and is one of a series of enactments which make a distinction between a man's signing by himself and signing by an agent; and it must, therefore, be considered that where signature by an agent is not mentioned, signature by the man himself is required (*e*). Even where the party to be charged is a *company*, and a *personal* signature is, therefore, impossible, signature by an *agent* will not satisfy s. 6 of 9 Geo. 4, c. 14. This was so held in *Swift v. Jewsbury* (P.O.) and *Goddard* (*f*). There the facts were as follows:—The plaintiff sued W. and G. jointly for a false representation with respect to the solvency of R. The defendant W. was sued as the public officer of a banking company formed under 7 Geo. 4, c. 46, and the defendant G. was the manager of one of their branches. The plaintiff was the customer of the S. Bank, and requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to "The Manager" of the defendant's banking company, requesting information whether R. was responsible to the extent of 50,000*l*. The defendant G. wrote a letter, which he signed as manager, giving a favourable reply as to R.'s responsibility. The plaintiff, acting upon the faith of this letter, supplied R. with goods, for which he was never paid, in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. The defendant's banking company had no knowledge, otherwise than through G., that such a letter had been written, and gave G. no express authority to write the letter, but the writing of such letter was an act done

(*e*) *Per curiam* in *In re Whitley Partners, Ltd.*, 32 Ch. D. 389, *et seq.* Where, however, a statute does *not* require personal signature, the Courts will *not* restrict the Common Law Rule contained in the well-known maxim *qui facit per alium facit per se*. See *Reg. v. Justices of Kent*, L. R. 8 Q. B. 305, 307.

(*f*) L. R. 8 Q. B. 244; *S. C.*, L. R. 9 Q. B. 301; 22 W. R. 319.

within the scope of the general authority conferred on G. as manager. It was held, on appeal, first, that G. was liable personally for the false representation; secondly, that by 9 Geo. 4, c. 14, s. 6, a false representation as to the credit of another person is not actionable unless it is signed by the person making it, and not by an agent merely, and that, therefore, if G. was to be considered an agent, the banking company was not liable (*a*); thirdly (overruling the decision of the Court below), that the signature of G. to the letter could not be considered the signature of the banking company itself; and, fourthly, that the letter was the representation of G., and not of the banking company.

(*a*) It is right to mention, however, that, while expressing this opinion, Lord COLERIDGE, C.J., stated that if the banking company had actually *profited* by the act of their manager, it might not be open to them to repudiate the liability accruing to them by his act. See also *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 412; *Swire v. Francis*, 3 App. Cas. 106; *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 714.

CHAPTER II.

THE OPERATION OF THE STATUTE OF FRAUDS ON
PROMISES TO GUARANTEE.

THE 4th section of the Statute of Frauds (*b*) has, it is almost needless to say, a very extensive and important bearing upon the subject of guarantees. The part of the section which deals with this subject is the second clause. That clause is, in substance (and omitting words not relating to the present subject), in the following terms: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized (*c*).

The second clause of 4th section Stat. Frauds relates to guarantees.

(*b*) 29 Car. 2, c. 3.

(*c*) The Mercantile Law Amendment Act (*Scotland*), 1856 (19 & 20 Vict. c. 60) provides, by s. 6, as follows, namely:—"From and after the passing of this Act, all guarantees, securities, or cautionary obligations, made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect." For cases under this enactment, see *Clydesdale Bank v. Paton* (1896), A. C. 381; *Wallace v. Gibson* (1895), A. C. 354; *Steele v. McKinley*, 5 App. Cas. 754.

The *Irish Statute of Frauds* (7 Will. 3, c. 12) contains, in s. 2, a provision identical with that contained in the English Statute of

Division of
present
chapter.

The second clause of the 4th section of the Statute of Frauds is carefully and accurately drawn, and important decisions have taken place upon every word of it. It is, therefore, proposed in this Chapter to consider it word by word, and to discuss (A) the *operation* of the statute in cases which it affects, as that operation is denoted by the words "no action shall be brought"; (B) to what kind of *promises* the section applies, as ascertained by the phrase "any special promise"; (C) the *kind of liability*, promises to answer for which fall within the section, as being indicated and comprised by the words, "the debt, default or miscarriages of another."

(A) The
operation of
s. 4 Stat.
Frauds
on cases
within it.
Verbal
guarantees
are not void,
but are not
enforceable
by action.

(A) The *operation* of the statute upon cases to which it applies is, and doubtless its framers intended that it should be, governed by the words "no action shall be brought." These words, therefore, should be noted. It has been held that they do not make verbal contracts, which are required by the enactment to be in writing, absolutely void; they merely bar the legal remedies by which they might otherwise have been enforced (a). That is to say, a contract which is not enforceable by reason of the provisions of the Statute of Frauds, s. 4, nevertheless is an existing contract, and a fresh contract cannot be implied from acts done in pursuance of it (b). But, as pointed out in *Leroux v. Brown* (c), to say that no action shall be brought upon a contract is, for most purposes, equivalent to saying that it shall be void (d).

Frauds (29 Car. 2, c. 3, s. 4) as to special promises to answer for the debt, etc., etc., of another person. The Statute of Frauds has substantially (but with more or less modifications) been generally re-enacted in the United States of America.

(a) *Per* Earl of SELBORNE, L.C. in *Maddison v. Alderson*, 8 App. Cas. at p. 474; and see *Crosby v. Wadsworth*, 6 East, 602, 611; *In re Hoyle, Hoyle v. Hoyle*, (1893) 1 Ch. at p. 97.

(b) *Britain v. Rossiter*, 11 Q. B. D. 123 C. A.

(c) 12 C. B. 801; 22 L. J. C. P. 1.

(d) And see *per* BOWEN, L.J., in *In re Rownson, Field v. White*, 29 Ch. D. at p. 364.

There are, however, cases in which verbal guarantees may be taken advantage of. Thus, it seems that superior courts of justice, by virtue of that jurisdiction which they possess over their own officers, will sometimes enforce a *verbal* guarantee against a person who has given it in his official capacity. This was decided in the case of *Re Greaves* (e). There an action having been commenced in the Common Pleas, and judgment obtained, *Greaves*, an attorney of the Court of *King's Bench* (but not an attorney of the Court of *Common Pleas*), who was acting professionally for the defendant, proposed to compromise the action, and agreed verbally to give his two promissory notes for the debt and costs, payable at six and nine months, in consideration of the plaintiff staying proceedings. This was accepted by the plaintiff. *Greaves*, however, afterwards declined to give the notes. Thereupon a rule was obtained in the *King's Bench*, calling upon him to pay the debt and costs. The court, in making this rule absolute, said, "Even supposing the undertaking to be void by the Statute of Frauds, the court might exercise a *summary jurisdiction* over one of its officers, an attorney of the court. The undertaking was given by the party in his character of attorney; and in that character the court may compel him to perform it. An attorney is conusant of the law, and, if he give an undertaking which he must know to be void, he shall not be allowed to take advantage of his own wrong, and say that the undertaking cannot be enforced." Again, it appears that an agreement required by the 4th section to be in writing may be proved by *parol evidence* in order to support a defence (f). So a verbal guarantee is so far good that, if money be paid under it, it cannot be recovered (g).

Verbal
guarantee
enforceable
against an
officer of
superior
court.

May be given
in evidence
in support of
a defence.

Money paid
under verbal
guarantee

(e) 1 Cr. & J. 374, n. ; and see *Evans v. Duncombe*, 1 Cr. & J. 372.

(f) *Lavery v. Turley*, 30 L. J. Ex. 49; see also *Macrory v. Scott*, 20 L. J. Ex. 90.

(g) *Shaw v. Woodcock*, 7 B. & C. 73.

cannot be recovered. It may be proved by parol evidence that one of the parties to a bill is a surety.

Again, when an action is brought on a bill of exchange, it may be proved by parol evidence that one of the parties is a surety (a). Thus, if the buyer of goods accepts a bill drawn upon him for the price by a surety, who afterwards indorses it to a seller, the surety cannot refuse to pay the amount upon default of the principal debtor, because the agreement under which the bill was signed was not in writing (b). The law merchant implies a contract of suretyship between the drawer and indorsee, and between the indorser and subsequent holders of a bill of exchange; and the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), contains provisions on the subject which are declaratory of the common law (c). The indorsing of a bill of exchange does not, however, create a contract of suretyship between the indorser and the prior parties to the bill (d).

An executor cannot by retainer obtain benefit of verbal guarantee given to him by his testator.

It might be considered that where a person, to whom a verbal guarantee has been given, becomes executor under the surety's will, he ought to possess, by retainer, the right of enforcing such guarantee, since he can in this way pay himself the amount due, without bringing an action to recover it. It has, however, been decided, in a very recent case, that an executor or administrator has no right of retainer in respect of a debt which, for want of written evidence, cannot be enforced by the 4th section of the Statute of Frauds (e). The ground of this decision would appear to be that, as an executor

(a) *Hall v. Wilcox*, 1 M. & Rob. 58; *Erwin v. Lancaster*, 6 B. & S. 571; *Oriental Corporation v. Overend*, L. R. 7 H. L. 348; *Pooley v. Harradine*, 7 El. & Bl. 431; *Greenough v. M'Clelland*, 2 Ell. & Ell. 424; 30 L. J. Q. B. 15.

(b) *Wilkinson v. Unwin*, 7 Q. B. D. 636, 638; but see *Steele v. M'Kinlay*, *infra*.

(c) Bills of Exchange Act, 1882, s. 55, sub-s. (2); and see *Castrique v. Buttigieg*, 10 Moo. P. C. 94, 108; *Steele v. M'Kinlay*, L. R. 5 App. Cas. 754, 769; *Holmes v. Durkee*, 1 C. & E. 23.

(d) *Wilkinson v. Unwin*, *ubi supra*.

(e) *In re Rowson*, *Field v. White*, 29 Ch. D. 358, C. A.; and see *Wildes v. Dudlow*, L. R. 19 Eq. 198.

or administrator would commit a *devastavit* who paid a debt to a creditor who is prevented from enforcing it by the 4th section of the Statute of Frauds, for the same reason, the right of retainer does not extend to such a debt (*f*). Another consequence of the determination that the 4th section of the Statute of Frauds applies not to the *validity* of the contract, but only to the procedure, is that an action will not lie in the courts of *this country* to enforce an oral agreement made in *France* (and binding there), which, if made *in England*, could not, by reason of the 4th section of the Statute of Frauds, have been sued upon (*g*). This is in accordance with the rule applicable to foreign contracts, namely, that so much of the law as affects the *rights* and the *merit* of the contract, all that relates “*ad litis decisionem*,” is adopted from the foreign country; so much of the law as affects the *remedy* only, all that relates “*ad litis ordinationem*,” is taken from the *lex fori* of that country where the action is brought (*h*).

Another question, which may arise upon the meaning of the words, “no action shall be brought,” is this: it Promise may be partly within the

(*f*) *In re Rowson, Field v. White, ubi supra, per FRY, L.J.*, other reasons are, however, given for this decision by COTTON, L.J., and BOWEN, L.J.; see also *Midgley v. Midgley*, (1893) 3 Ch. at p. 289, where ROMER, J., says: “Now the general rule with regard to the duty of an executor is clear; if he pays that which need not be paid, it is a *devastavit*. To this rule there is one exception in the case of a debt not enforceable by reason of the Statute of Limitations; for it has been held that an executor is not bound to plead the Statute of Limitations and may therefore pay a claim” [*not yet adjudicated upon*] “when the only defence would be that statute. This exception is an anomaly and ought not to be extended, as was pointed out by Lord Justice FRY in the case of *In re Rowson*.”

(*g*) *Leroux v. Brown*, 12 C. B. 801. In *Williams v. Wheeler*, 8 C. B. (N.S.) at p. 316; WILLES, J., thus refers to *Leroux v. Brown*, “though I fully recognize the principle upon which the judgment of this court in *Leroux v. Brown* professes to be founded, I am not satisfied that either of the sections” (*i.e.*, 4 and 17) “of the Statute of Frauds to which reference has been made, warrants the decision.”

(*h*) *Per TINDAL, C.J.*, in *Huber v. Steiner*, 2 Scott, 304—326; and see *British Linen Co. v. Drummond*, 10 B. & C. 903.

4th. action
and partly
outside of it.

No right of
action on
part outside
statute where
not separable
from other
part.

sometimes happens that a promise is, as to *part* of the thing promised, within the Statute of Frauds, but as to the *remainder*, is not within the statute. The point then arises, whether an action can be maintained upon the part *not* within the statute. The words of the section do not, it will be noted, make the whole promise void, but simply say, "no action shall be brought." The rule applicable to such cases appears to be this: if the parts are *severable*, an action will lie on the part *outside* the statute; but, if the parts are *inseparable*, then no such action lies. In the case of *Chater v. Becket* (a), the plaintiff and defendant were both creditors of one Harrison, who had become insolvent, and with whom all the creditors but the plaintiff were anxious to come into a composition. The plaintiff, however, declined to accept the composition unless certain expenses he had been put to were paid him, as well as the proposed composition. The defendant accordingly, verbally promised to pay him what he asked, and subsequently paid the amount of the composition, but refused to pay the expenses; whereupon the plaintiff paid the expenses incurred by him, and brought this action against the defendant to recover them. The plaintiff declared upon the special agreement, and for money paid to the defendant's use. Two points were made: first, whether the special agreement was void by the Statute of Frauds? and, secondly, supposing it to be so, whether the plaintiff could not recover the costs paid to the attorney as for money paid to the defendant's use? Lord *Kenny*, in delivering his opinion, said: "The promise, therefore, was certainly void in part by the statute; and the agreement being entire, the plaintiff cannot now separate it and recover on one part of the agreement, the other being void; and, if that agreement be void, there is an end of the case; for where there is

(a) 7 T. R. 201. See observations on this case in *Wood v. Benson*, 2 C. & J. 94.

an express promise, another promise cannot be implied." *Grose*, J., in the same case, said: "It seems admitted that part of this promise is void by the statute; but it was one indivisible contract, and the plaintiff cannot recover on any part."

The same point was decided in *Thomas v. Williams* (b). There the verbal promise of the defendant was to pay rent *actually due* to the plaintiff from A., and also rent to *become due*, in consideration that the plaintiff would not distrain A's goods. It was held by the court, that as the promise to pay rent to *become due* was void by the Statute of Frauds, the entire promise was therefore void. So, also, in the old case of *Lexington v. Clarke* (c), it appeared that the plaintiff allowed the widow of A. B. to retain possession of certain premises which the plaintiff had demised to A. B. on receiving from her a promise to pay arrears of rent due from A. B. at the time of his death, and also 260*l.* more. It was argued at the bar, that, inasmuch as the promise to pay rent in arrear was alone affected by the 4th section of the Statute of Frauds, the promise might stand good as to the 260*l.* "But, by the opinion of all the court, judgment was given for the defendant; for the promise, as to one part being void, it cannot stand good for the other; for it is an entire agreement, and the action is brought for both the sums, and indeed could not be otherwise without variance from the promise."

Where, however, from the nature of the case, it is possible to separate that part of the promise which is within the statute from that which is not, the plaintiff can recover upon the latter portion. This was decided in the case of *Wood v. Benson* (d). There the guarantee was in the following words; "I, the undersigned, do hereby engage to pay the directors of the Manchester Gas Works, or their collector, for all the gas which may

Where the promise is separable action maintainable on part outside the statute.

(b) 10 B. & C. 664.

(c) 2 Vent. 223.

(d) 2 C. & J. 94.

be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. Neville; and I do also engage to pay for all arrears which may now be due." An action on *assumpsit* was brought upon this guarantee, and there was also a count for gas and goods sold and delivered. The defendant pleaded the general issue. It was objected, at the trial at Nisi Prius, that there was no consideration apparent on the face of the instrument for the promise to pay the arrears, and that the agreement being consequently void as to part under the Statute of Frauds, was also void as to the whole. The jury were directed by the judge to find for the plaintiff, with leave to the defendant to enter a non-suit. A rule having been subsequently obtained and argued, Lord *Lyndhurst*, C.B., in delivering judgment, said: "The case of *Thomas v. Williams* may, as it appears to me, be supported. Part of the contract in that case was void by the Statute of Frauds. The declaration stated the entire contract, including that part of it which was void, and therefore the contract, as stated in the declaration, was not proved. The same observation applies to *Lexington v. Clarke* and *Chater v. Becket*, and I have no disposition to complain of those decisions, because in none of those cases does there appear to have been any count upon which the plaintiff could recover. But the question in the present case is widely different. The contract resolves itself into two parts. One is, 'I engage to pay for all the gas which may be consumed,' etc.: that is a distinct engagement. The other part is, 'And I do also engage to pay all arrears,' etc. Now, this latter part cannot be sustained, for if it be a distinct engagement, there is no consideration to support it expressed on the instrument (a). The question then is, if I undertake to pay for goods which may be supplied,

(a) This is now no longer necessary; see 19 & 20 Vict. c. 97, s. 3.

though there is no promise to supply the goods, whether, when the goods are supplied, a right of action does not accrue to recover the amount. It is quite clear that it does. And though the latter part of the engagement cannot be sustained under the first part of the engagement, the plaintiff is entitled to recover for the gas subsequently supplied, and therefore the verdict must stand for 15*l.* 4*s.* 6*d.*” *Bayley, B.*, in his judgment in this case, says: “In each of the cases referred to for the purpose of showing that the contract, if void in part was void *in toto*, there was a failure of proof. The declaration in each of those cases (b) stated the entire promise, as well that part which was void as that which was good. I think, therefore, that these cases are to be supported on the principle of the failure of proof of the contract stated in the declaration, but that they do not establish that, if you can separate the good part from the bad you may not enforce such part of the contract as is good. I am, therefore, of opinion that the verdict must stand for the amount of the gas subsequently supplied.”

Though the enactment under consideration provides that “no action shall be brought” on a verbal guarantee, a defendant who wishes to shelter himself thereunder must, as a rule, plead it specially. On this subject it is provided by Order XIX. r. 15 of the Rules of the Supreme Court, 1883, that the Statute of Frauds must be specially pleaded, or it cannot be taken advantage of (c). It is not, however, necessary to plead any particular section, and it is therefore better not to do so, as, should mention be made of any particular section, the party pleading will not always be allowed to amend so as to avail himself of some

(b) *I.e.*, *Chater v. Becket*, 7 T. R. 201; *Lexington v. Clarke*, 2 Vent. 223; *Thomas v. Williams*, 10 B. & C. 664.

(c) *Clarke v. Callow*, 46 L. J. Q. B. 53; *Dawkins v. Lord Penrhyn*, 4 App. Cas. 51, 58.

other section (a). The House of Lords has held, in a very recent case, that where the plaintiff, in his statement of claim, alleges a *written* guarantee (when in point of fact there is only a *verbal* one), and the defendant, deceived by this allegation, omits to plead in his defence the Statute of Frauds, he may, nevertheless, set it up at the trial, as the Statute need not be pleaded till the occasion for it has arisen (b).

(B) The *kind of promises to which the 4th section of Statute of Frauds applies.* (B) The 4th section of the Statute of Frauds next prescribes the *kind of promises* to which the enactment shall apply. For it does not govern *all* possible cases in which a person is liable to answer, in contract, for the debt, default or miscarriages of another. The kind of promises to which it *is* applicable are indicated by the words "*any special promise.*"

Whether indemnities within the statute.

Thus, for instance, it has been doubted whether an *indemnity* is a promise which falls within the statute. Upon this question, however, it appears that no general rule can be laid down. It was, indeed, stated as a general proposition, in *Thomas v. Cook* (c), that a promise to *indemnify* does not fall within the words or the policy of the Statute of Frauds. That proposition was, however, denied by the full Court of Queen's Bench in *Green v. Cresswell* (d). This last-named case, which we shall discuss in detail later on, was, however, disapproved of, though not reversed, by the Court of Exchequer Chamber, in *Cripps v. Hartnoll* (e), and by *Malins, V.-C.*, in *Wildes v. Dudlow* (f), in which case it was held that where one

(a) *James v. Smith*, (1891) 1 Ch. 384.

(b) *Bunning* (Pauper) v. *Odams Bros, Ltd.*, 13 T. L. R. 65.

(c) 8 B. & C. 728.

(d) 10 Ad. & E. 453.

(e) 4 B. & S. 414. See also the cases of *Reader v. Kingham*, 13 C. B. (N.S.) 344; *Batson v. King*, 4 H. & N. 739; *Fitzgerald v. Dressler*, 7 C. B. (N.S.) 374, 385, 386, where the case of *Green v. Cresswell* is observed upon.

(f) L. R. 19 Eq. 198.

person induces another to enter into an engagement, by a promise to indemnify him against liability, that is not an agreement which the Statute of Frauds requires to be in writing. Reference must now be made to the very recent case of *Guild & Co. v. Conrad* (g), in which *Thomas v. Cook*, *supra*, and *Wildes v. Dudlow*, *supra*, were approved of and followed by the Court of Appeal. It was there held (affirming the judgment of *Mathew*, J.), that a promise by the defendant in consideration of the plaintiff accepting certain bills of exchange, to indemnify him from liability to make payments in respect of such bills, is a promise of indemnity and not of guarantee, and, therefore, is not required to be in writing. This case is undoubtedly "very near the line," as *Lindley*, L.J., admits in his judgment. As, however, the evidence given as to the character of the defendant's promise was capable of two interpretations, the Court felt at liberty to adopt that which took the case out of the Statute of Frauds, and to hold (as *Mathew*, J., did at the trial) that it was a promise to keep the plaintiff indemnified against a liability on certain bills, which he was asked by the defendant to accept, and that it was not a promise to pay in the event of some other person being in default. If A. undertakes a liability at the request of B., and upon a promise by B. to pay A. what he pays under the liability, B.'s promise is a mere indemnity and outside the statute. This was recently held by *Chitty*, J., and also by the Court of Appeal in *In re Bolton's Estate*, *Morant v. Bolton* (h), where effect was given to a verbal promise made by a man to his solicitors, that in consideration of their procuring the bankers of a limited company a loan to the company of 4,000*l.* on their personal guarantee, he would repay them what they might be called upon to pay to the amount of 2,000*l.*

(g) (1894) 2 Q. B. 885, C. A.

(h) W. N. (1892) 114, 163; 8 T. L. R. 668.

under their guarantee. It would *seem*, moreover, that a promise by one of several partners to indemnify the rest against loss to the firm in respect of whatever balance might ultimately be found due to the firm from one of the partners is not a guarantee, but a mere indemnity to which the Statute of Frauds does not apply (a). So far, then, as concerns *express* promises to indemnify, it appears to be impossible to draw a definite line between those which are within and those which are without the 4th section. Perhaps, therefore, the best solution of the difficulty is that suggested in Smith's Mercantile Law (b), namely, "that a promise to indemnify may or may not be within the statute, according to circumstances" (c). That is to say, the facts of each individual case must be examined with a view to its correct diagnosis, and while on the one hand, a contract, which is in substance a guarantee, will not cease to be one from being put into the form of an indemnity (d), so, on the other hand, one which is in substance an indemnity, and imports no primary liability, will not lose that character from being shaped as or termed a guarantee. In this connection it may be as well to mention that the liability of the assignor of a lease after assignment upon his express covenants in the original lease is not really one of suretyship;

(a) *In re Hoyle*, *Hoyle v. Hoyle*, (1893) 1 Ch. 84; 41 W. R. 81; and see *Guild & Co. v. Conrad*, *supra*. The contract of underwriters contained in a policy of marine insurance is one of indemnity. See *per* Earl of SELBORNE in *McCowan v. Baine* (1891), A. C. at p. 403.

(b) Note (t), 10th ed., p. 571.

(c) For instances of indemnities within the Statute of Frauds see *Adams v. Dansey*, 4 M. & P. 245; 6 Bing. 506; *Green v. Cresswell*, 10 A. & E. 453; *Cresswell v. Wood*, 10 A. & E. 460; *Wineworth v. Mills*, 2 Esp. 484; *Mallet v. Bateman*, L. R. 1 C. P. 163. In Taylor on Evidence, 9th ed., vol. ii., p. 678, it is stated that "promise to indemnify, if not within the words is at least within the spirit of the statute."

(d) See *Cripps v. Hartnall*, *supra*; Pollock on Contracts, 6th ed. p. 156.

neither is his contract a guarantee (e), nor do the general principles of the law of suretyship apply thereto (f). There are, however, many cases in which the law *implies* indemnities in obedience to principles of justice (g). Thus it would seem that whenever circumstances arise in the ordinary business of life in which if two persons were ordinarily honest and careful the one of them would make a promise of indemnity to the other, it may properly be inferred that such a promise was given and accepted (h). So far as regards implied indemnities, it may safely be stated that they are clearly excluded from the operation of the 4th section of the Statute of Frauds. This results from the adoption of the phrase "*special* promise," which is evidently opposed to the phrase "*implied* promise" (i). Of these this work does not profess to treat.

It has also been made the subject of discussion whether or not a promise to *give* a guarantee (as distinguished from a promise to *procure* one) (k) is a

Implied indemnities are outside the statute.

Promise to give a guarantee is within the statute.

(e) *Per* Lord ESHER, M.R. in *Baynton v. Morgan*, 22 Q. B. D. at p. 77.

(f) *Baynton v. Morgan*, 22 Q. B. D. 74, C. A.

(g) See *Westropp v. Solomon*, 8 C. B. 345; *Edmunds v. Wallingford*, 14 Q. B. D. 811; *Hancock v. Caffyn*, 8 Bing. 358; *Dugdale v. Lovering*, L. R. 10 C. P. 196; *Moule v. Garrett*, L. R. 5 Ex. 132; *Reynolds v. Doyle*, 1 M. & Gr. 753; *Benson v. Duncan*, 3 Ex. 644; *Eddowes v. Argentine Loan, &c., Co.*, 63 L. T. 364 C. A.; *Walker v. Bartlett*, 18 C. B. 845; *Bahin v. Hughes*, 31 Ch. D. 390; *Jones v. Orchard*, 16 C. B. 14; and see *The Orchis*, 15 P. D. 38. It is now provided by the Partnership Act, 1890 (53 & 54 Vict. c. 39) s. 24 (2) that the firm must indemnify every partner in respect of payments made by him (a) in the ordinary and proper conduct of the business of the firm; and (b) in or about anything necessarily done for the preservation of the business or property of the firm. And the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), by s. 4 prescribes an indemnity where the name of a person has been improperly inserted as a director.

(h) *Ex parte Ford*, *In re Chappell*, 16 Q. B. D. 305, C. A.; see also *ex parte James* L. R. 9 Ch. 609.

(i) Throop on the Validity of Verbal Agreements, p. 166.

(k) See *Bushell v. Beaven*, 1 Bing. N. C. 103, and *post*, p. 89, as to promises to *procure* a guarantee to be signed by a third person.

special promise which falls within the statute. It is, however, obvious that a promise to give a guarantee at a future time entirely falls within the mischief which the enactment was intended to guard against, and, indeed, that if the statute could be evaded by making such a promise it would be useless. Accordingly it has been held, that a promise to *give* a guarantee must be in writing. This was decided in *Mallet v. Bateman (a)*. *Pollock, C.B.*, in delivering the judgment of the Court of Exchequer Chamber in this case, said: "My brother *Blackburn* has, in the course of the argument, stated that which appears to me to dispose of this case, viz., that a contract to give a guarantee is required to be in writing as much as a guarantee itself. If we were to hold that a contract of guarantee must be in writing but that a contract to give a guarantee need not, we should, I think, be committing the same mistake as our predecessors did with reference to the Statute of Uses. The object of that statute was that the possession should go along with the use; but a construction was early adopted whereby the possession should go to A. in trust for B., and so the effect of the statute was simply to add a few words to the conveyance. Whether the decisions of the Courts of Equity as to uses and trusts were beneficial or not I do not stop to inquire, but undoubtedly the whole doctrine arose out of a desire to frustrate the intention of the Statute of Uses. I trust we shall not commit a similar mistake in construing the statute now under consideration."

(C) The kind
of liability
to which 4th

(C) Having pointed out the *operation* which it is intended to have, and the *kind of promises* to which it

(a) *L. R.* 1 C. P. 163; *S. C.* (in court below), 16 C. B. (N.S.) 530; and see *Wallace v. Gibson* (1895), A. C. 354, where it was held that an undertaking by the defenders to *give*, when required, a guarantee for the repayment of money to be lent by the pursuer is a good "cautionary obligation" within the meaning of s. 6 of the Mercantile Law (*Scotland*) Amendment Act, 1856 (19 & 20 Vict. c. 60), and is as binding on the defenders as a *direct* obligation.

is intended to apply, the section under discussion next proceeds to define the *kind of liability*, promises in respect of which are intended to be affected. This it does in the words "*the debt, default or miscarriages of another.*" These words, it will be at once seen, are most comprehensive. And they have been made the subject of a good deal of learned discussion. To commence with the words, "debt, default or miscarriages": it would seem that these three words point to three distinct kinds of guarantee, namely, (1) guarantees for the payment of a "*debt*" already contracted by another person; (2) guarantees against the "*default*" of another person, *i.e.*, for the payment of debts to be contracted by another person, or against loss that may occur from another's future breaches of duty; and (3) guarantees against the "*miscarriages*" of another person, *i.e.*, against loss that may occur from another's *past* or *future* breaches of duty.

The words "debt, default or miscarriages" have frequently been commented upon, and it has been doubted whether the word "miscarriages" is not superfluous. Certainly the word "default" is large enough to include promises to be answerable for *future* breaches of *contract*, as well as promises to be answerable for *future* breaches of *duty*. And, on the other hand, it appears that the word "miscarriages" can clearly only apply to breaches of *duty*, and cannot apply to breaches of *contract*. But it is submitted that, unlike the word "default," the word "miscarriages" includes *past* breaches of duty as well as *future* breaches, and that, therefore, it is not a superfluous word at all.

Mr. Throop, in his able work on the Validity of Verbal Agreements (*b*), says that, but for the word "default" occurring in the 4th section of the Statute of

Frauds, the words "debt" and "miscarriages" would perhaps have been confined to *past* transactions, being peculiarly applicable to such. It is, however, submitted that, though the word "debt" is certainly peculiarly applicable to past transactions, the word "miscarriages" is not, and that it clearly includes both *past* and *future* breaches of duty. If this view be correct, then it would seem that the word "default" must have been used by the framers of the 4th section in a restricted sense, namely, as applying merely to future *debts*, and not to future breaches of *duty*, though our courts have certainly treated it as equally applicable to both.

If, however, the legislature had omitted to employ the word "miscarriages" the 4th section of the Statute of Frauds might well have been confined to promises to be answerable for *past* and *future* breaches of *contract*, on the ground that the word "default" was meant merely to supplement the word "debt," and must be so confined in its meaning, though capable of a larger construction. In fact, the word "debt" would have been the *key-word* in the clause, and would have served as an indicator of the sense in which the word "default" was used by the legislature.

Notwithstanding the employment of the word "miscarriages" in the 4th section of the Statute of Frauds, it seems at one time to have been thought that this enactment did not affect promises to be responsible for the future wrongful acts or torts of third persons. Thus, in *Birkmyr v. Darnell* (a), it seems to have been considered that, if the alleged principal debtor had not been chargeable in contract, but had only been liable to an action of tort, the promise of the defendant to be answerable for him would not have been within the statute. Thus, *Powell, J.*, says (b): "The objection

(a) 2 Lord Raym., p. 1085, where it is called *Buckmyr v. Darnell*; *S. C.*, 1 Sm. L. C., 10th ed., p. 287.

(b) In the other reports of this case the judgment of *POWELL, J.*, is not given.

that was made was, that if *English* did not re-deliver the horse, he was not chargeable in an action upon the promise, but in *trover* or *detinue*, which are founded upon the *tort*, and are for a matter subsequent to the agreement. But I answered that *English* may be charged on the bailment in *detinue* on the original bailment, and a *detinue* is the adequate remedy; and upon the delivery *English* is liable in *detinue*, and *consequently* this promise by the defendant is collateral, and is within the reason and the very words of the statute." Any doubt that may have been caused by these observations of Justice *Powell*, or by the decision in *Read v. Nash* (c), was certainly entirely removed by the case of *Kirkham v. Marter* (d). There A. had wrongfully, and without the license of B., ridden his horse, and thereby caused its death. It was held, that a promise by a third person to pay the damage thereby sustained, in consideration that B. would not bring any action against A., was a collateral promise within the Statute of Frauds, and must be in writing. "This case," said *Holroyd, J.*, in his judgment, "is certainly within the mischief contemplated by the legislature, and it appears to me to be within the plain, intelligible import of the words of the Act of Parliament." So *Abbott, C.J.*, in the same case, said: "The wrongful riding the horse of another without his leave and license, and thereby causing its death, is clearly an act for which the party is responsible in damages, and therefore, in my judgment, falls within the meaning of the word 'miscarriage'" (e).

The meaning of the words "debt, default or miscarriages" was also discussed in the following cases:—
In the case last cited, of *Kirkham v. Marter* (f),

(c) 1 Wils. 305.

(d) 2 B. & Ald. 613, 616, 617.

(e) See also *Throop* on the Validity of Verbal Agreements, pp. 193, 194.

(f) 2 B. & A. 613, 616, 617. See this case *supra*.

Abbott, C.J., says: "Now the word 'miscarriage' has not the same meaning as the word 'debt' or 'default'; it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another without his leave and license, and thereby causing its death, is clearly an act for which the party is responsible in damages, and therefore, in my judgment, falls within the meaning of the word 'miscarriage.'" In the same case, *Holroyd, J.*, said: "I think the term *miscarriage* is more properly applicable to a ground of action founded upon a tort than to one founded upon a contract; for in the latter case, the ground of action is, that the party has not performed what he agreed to perform, not that he has misconducted himself in some matter for which by law he is liable. And I think that both the words *miscarriage* and *default* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract."

In *Mountstephen v. Lakeman (a)*, *Willes, J.*, said: "Again, if there was a contract with reference to a liability, not existing at the time, by reason of the debt not being due at the time, that would come under the word *default*, and there would be no difficulty about that."

On the other hand, it should be mentioned that, in *Eastwood v. Kenyon (b)*, Lord *Ellenborough* seemed to think there was no distinction in meaning between the words "default" and "miscarriage."

These observations and authorities will probably throw sufficient light upon the meaning of the words "debt, default or miscarriages." It remains to notice

(a) L. R. 5 Q. B. 613; S. C., L. R. 7 Q. B. 197, 202; S. C., 7 H. L. 17.

(b) 2 East, 325.

the words "*of another*" (c). Like the other words of the statute, they are of much importance, and a large body of law has turned upon their meaning. Their operation has, however, now been ascertained by a long current of authority, which has indisputably established that they restrict the 4th section of the Statute of Frauds to cases where, either at the time the promise is made there is some person actually liable, *in the first instance*, to the promisee, and who remains so liable, notwithstanding such promise, *or* where, at the time such promise is made, the future *primary* liability of a third person to the promisee is contemplated, as the very foundation of the promise. The same idea is often expressed by the words, "the promise must be *collateral*" (d).

It is, however, necessary to observe that there are many cases where the promise is undoubtedly, in a certain sense, *collateral*, and yet to which the 4th section of the Statute of Frauds has no application. These will sufficiently appear while we are discussing the rules for determining what contracts are within the meaning of the second clause of the 4th section of the Statute of Frauds. The rules in question, which it is believed embody the legal principles contained in many decisions on this clause, are five in number, namely ;

Rules for determining what promises are within Statute of Frauds, s. 4.

I. At the time the promise is made there must be some person actually liable, in the first instance, to the promisee for the debt, default or miscarriage guaranteed against, or, at all events, the creation of such liability, at some future time, must be contemplated as the foundation of the contract.

Rule I. Liability of third party for debt, &c. guaranteed must exist or be contemplated.

(c) See *per* BOWEN, L.J., in *In re Hoyle, Hoyle v. Hoyle*, (1892) 1 Ch., at p. 99, as to the importance of these words.

(d) The term *collateral* does not, however, occur in the 4th section of the Statute of Frauds, and, moreover, it involves the question, "What is a *collateral promise*?" which is quite as difficult to answer as the question, "What is a promise to answer for the debt, default or miscarriages of another person within the 4th section of the Statute of Frauds?"

Rule II.
Promise must
be made to
the creditor.

II. The promise must be made to the creditor, *i.e.*, to the person to whom another is already or is thereafter to become liable and, *semble*, who can bring an action to enforce such liability.

Rule III.
Absence of
liability on
part of surety
other than
on his
guarantee.

III. There must be an absence of all liability or interest on the part of the promiser (the surety), except such as arises from his express promise.

Rule IV.
Fulfilment of
third party's
obligation the
main object
of promise.

IV. The *main* or *immediate* object of the agreement between the parties must be to secure the payment of a debt or the fulfilment of a duty by a third person.

Rule V.
Transaction
must not
amount to a
sale by
creditor to
surety.

V. The agreement between the promiser and the creditor, to whom the promise is made, must not amount to a sale by the latter to the former of a security for a debt or of the debt itself.

It is proposed to treat of these rules in the order above given.

RULE I.

Liability of
third party
for debt, etc.
guaranteed
must exist
or be con-
templated.

RULE I.—*At the time the promise is made there must be some person actually liable, in the first instance, to the promisee for the debt, default or miscarriage guaranteed against, or, at all events, the creation of such liability, at some future time, must be contemplated as the foundation of the contract (a).*

The present or future primary liability of another

(a) It has been suggested by Judge STONOR, in his very able judgment in *The Crystal Palace Gas Co. v. Smith* (De Colyar's "County Court Cases," p. 38), that a guarantee is not within s. 4 of the Statute of Frauds unless the liability of some third person be actually *contemplated* by the contracting parties, even though, as a matter of fact, such liability may *exist*. While admitting that this is a reasonable view (as the nature of every contract depends upon the intention of the contracting parties), and that, moreover, it is countenanced by certain *obiter dicta* of the judges in *Mountstephen v. Lakeman* (L. R. 7 Q. B. 197; S. C., 7 H. L. 17), it has been thought best not to alter the original wording of this rule, because in some of the reported cases (see *post*, p. 70, *et seq.*) the Statute of Frauds has been held to apply when the liability of a third person *existed in fact*, without considering whether or not the parties had *contemplated* such liability as the foundation of their contract.

person to the person to whom the promise is made is the very basis or foundation of the contract of guarantee. This proposition is, in effect, laid down by the judges in the celebrated case of *Birkmyr v. Darnell* (b), where it was held, that a promise is not within the Statute of Frauds, 4th section, unless the creditor have a right of action against the principal debtor. The facts of this well-known case (which was argued fully, and upon which all the judges were consulted) are simple enough, as will be seen from the following report, taken from 1 Salkeld, p. 27: "Declaration—That in consideration the plaintiff would deliver his gelding to A., the defendant promised that A. should re-deliver him safe, and evidence was given that the defendant undertook that A. should re-deliver him safe; and this was held a collateral undertaking for another, for where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but as his servant, *and there is no remedy against him*, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment against the original hirer, as well as *assumpsit* upon the promise against this defendant. *Et per cur.* : If two come to a shop and one buys, and the other, to gain him credit, promises the seller, *If he does not pay you, I will*, this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, *Let him have the goods; I will be your paymaster*, or, *I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant."

This rule laid down in *Birkmyr v. Darnell*.

(b) 6 Mod. 248; 2 Lord Raym. 1085; 1 Salk. 27; 1 Sm. L. C. 10th ed. P. 287. See observations on this case by Lord HARDWICKE in *Tomlinson v. Gill*, Amb. 330.

RULE I.
Ante, p. 66.

In the second volume of Lord Raymond's Reports, p. 1087, the following report of the judgment of *Holt*, C.J., in *Birkmyr v. Darnell* is given: "The last day of the term the Chief Justice delivered the opinion of the court. He said that the question had been proposed at the meeting of judges, and that there had been great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant, but that the judges of this court were all of opinion that the case was within the statute. The objection that was made was, that if *English* did not re-deliver the horse he was not chargeable in an action upon the promise, but in *trover* or *detinue*, which are founded upon the *tort* and are for a matter subsequent to the agreement (*a*). But I answered, that *English* may be charged on the bailment in *detinue* on the original delivery, and a *detinue* is the adequate remedy, and upon the delivery *English* is liable in *detinue*; and consequently this promise by the defendant is collateral and is within the reason and the very words of the statute, and is as much so as if, where a man was indebted, J. S., in consideration that the debtee would forbear the man, should promise to pay him the debt, such a promise is void unless it be in writing. Suppose a man comes with another to a shop to buy, and the shopkeeper should say, 'I will not sell him the goods unless you shall undertake he shall pay me for them,' such a promise is within the statute; otherwise if a man had been to pay for the goods originally. So, here, *detinue* lies against *English*, the principal; and the plaintiff having this remedy against *English*, the principal, cannot have an action against the defendant, the undertaker, unless there had been a note in writing."

In the note to *Birkmyr v. Darnell*(*b*), it is stated that,

(*a*) See remarks on this part of the judgment, *ante*, p. 62, 63.

(*b*) 1 Salk. 27, Evans' edition.

“from all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods, etc. are furnished is liable at all any other person’s promise is void, except in writing” (c).

RULE I.
Ante, p. 66.

On this proposition Mr. Justice *Willes* made the following remarks in the important case of *Mountstephen v. Lakeman* (d) : “The leading case upon the application of the Statute of Frauds has generally been considered to be *Birkmyr v. Darnell*, and in the note to Mr. Evans’ edition of Salkeld’s Reports it is stated that ‘from all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods are furnished is liable at all any other person’s promise is void, except in writing.’ I think that may very well be modified,—or if his liability is made the foundation of a contract between the plaintiff and the defendant and that liability fails, the promise is void,—so as to include the case which I put to Mr. *Charles* (e), of persons wrongly supposing that a third person was liable and entering into a contract on that supposition. If, in such a case, it turned out that the third person was not liable at all the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The *lex contractus* itself would make an end of the claim, and not the application of the Statute of Frauds, whether the contract was in writing or not, and whether signed or not. The law of contract gives you as foundation that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of the principal contract, the contract of suretyship would fail. Again, if there was a contract with reference to a liability not existing at

Observations
of *Willes, J.*,
in *Mount-
stephen v.
Lakeman*.

(c) See also Comyns’ Digest, Action on Assumpsit (F. 3), 5th ed. vol. i., p. 319, note (f).

(d) L. R. 7 Q. B. 197; S. C., L. R. 5 Q. B. 613; 7 H. L. 17.

(e) The counsel for the plaintiff.

RULE I.
Ante, p. 66.

the time, by reason of the debt not being due at the time, but being payable *in futuro*, that would come under the word 'default,' and there would be no difficulty about that. So, if there was a contract, 'if A. B. will employ you to do work, I promise to become surety for him that he shall pay you;' in that case the promise would clearly come within the statute, because, although there was no liability existing at the time when the promise was made, there was a liability contemplated as the foundation for the promise of the defendant. It was a contract of suretyship in respect of a liability to be created; but if the liability were not created, there again the *lex contractûs* would prevail. There would be the condition precedent to the arising of any liability as surety, that there should be a principal debtor established. In all these cases, no doubt, one agrees thoroughly with what was laid down in the Court of Queen's Bench, because you have the case of principal debt contemplated by the parties and suretyship founded in respect of that principal debt. *But to bring the case within that rule you must first of all show that the parties did intend that there should be a principal debtor" (a).*

In accordance with the principles which have thus been laid down, it is now a well established rule, that where a liability on the part of a third person exists or is contemplated, the promise falls within the statute; but that where no liability on the part of a third person exists or is contemplated, the promise does not fall within the statute.

Examples of
 Rule I.
 discussed.

There are numerous reported cases in which it has been held that a liability did exist on the part of a third person, and that, therefore, the rule first enunciated caused the statute to apply.

(a) See also the judgment of Lord SELBORNE in the same case at p. 24 of 7 H. L..

Thus, *Coleman v. Eyles* (b) was such a case. The facts were as follows: A landlord to whom rent was due gave a warrant to A. to distrain upon the tenant. The defendant, who was a creditor of the landlord, paid the broker, who valued the goods, and put the plaintiff on the premises to keep possession of the goods, and promised to pay him his charges and also to repay him certain sums to be advanced to another. This promise was held by Lord *Ellenborough* to be within the statute on the ground that the landlord was liable as principal for the necessary expenses of the distress and therefore the promise was to pay the debt of another.

RULE I.
Ante, p. 66.

Cases where liability of third person existed.

Coleman v. Eyles.

The decision in *Tomlinson v. Gell* (c) turned upon the same principle. There A. had commenced a Chancery suit against B. T. acted as A.'s attorney in the suit, and 30*l.* had become due to him for his costs in the suit, when he and B. agreed, with the consent of A., that the suit should be discontinued, and that B. should pay T. the costs which were due. B., in consideration of A. having consented to discontinue the suit and T. to accept payment of his costs from B., promised T. to pay him such costs. It was held, that B.'s promise was a promise to pay the debt of another within the 4th section of the Statute of Frauds. Now, it is to be noticed that in this case A. remained liable to his attorney, T., notwithstanding the promise of B. The transaction was neither more nor less than the defendant undertaking to pay the bill of costs which the plaintiff in Chancery owed the plaintiff in this suit.

Tomlinson v. Gell.

So also, in *Brunton v. Dullens* (d), it was held, that a promise to pay a debt to be transferred from promiser's account to that of a third party, his agent, is a genuine guarantee, and that *parol* evidence was only admissible to

Brunton v. Dullens.

(b) 2 Stark. 62.

(c) 4 Ad. & E. 564.

(d) 1 F. & F. 450.

RULE I.
Ante, p. 66.
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identify the debt. The report of this case is exceedingly brief. It appeared that B., acting as agent for the defendant, ordered goods for him from the plaintiff. It was subsequently agreed that these goods should be supplied to B., and that the order which had been entered by plaintiff to the defendant, should be accordingly entered in the plaintiff's books to B. instead. In consideration of this arrangement the plaintiff required a security, and the defendant wrote to him in these terms, "with regard to the transferring of B.'s order, it shall be paid." Now, such a promise would clearly come within the 4th section of the Statute of Frauds, because it would only amount to a promise to pay for the goods supplied to B., if B. did not himself pay for them.

Chater v.
Becket.

The case of *Chater v. Becket (a)*, if it was rightly decided, also belongs to the class of cases now under review. In that case, in consideration that the plaintiff would *stay all proceedings* against one *Harris*, and would accept certain bills of exchange, drawn or accepted by the defendant, for a certain part, namely, 10s. 3d., the defendant undertook and promised to give the plaintiff such bills for the same, and to pay all the expenses which the plaintiff had been put to, in and about a certain intended commission of bankruptcy. It was held, that the promise of the defendant to pay 10s. in the pound of *Harris's* debts was within the statute of Frauds. Now, with reference to this case, it is to be remarked that the question whether *Harris* remained liable, notwithstanding the promise of the defendant, does not seem to have been brought before the court, and altogether the decision in this case is far from satisfactory. But is it presumed, that if this case decides that though *Harris*, the principal debtor, was released from liability by the promise of the defendant,

(a) 7 T. R. 201. *Vide ante*, p. 54, 55.

such promise was within the 4th section of the Statute of Frauds, it is no longer law. RULE. I.
Aute, p. 66.

Another example of the operation of the rule, that if a third person is liable the statute applies, is afforded by the case of *Re Willis* (b). In that case A. & Co. *Re Willis*. bought certain wools of B. & Co., to be paid for by the buyer's acceptance at eight months. Before the sale was completed, B. & Co., requiring some security, in consideration of 1l. per cent., obtained the following instrument from C., signed by him: "Gentlemen, in consideration of 1l. per cent., I hereby guarantee the due and correct payment of half the amount of 136 bales of wool, sold to Messrs A. & Co., as per contract," etc. It was held that the instrument was a guarantee.

Where a person promises that the creditors of a third person shall be paid the amount of a composition in lieu of their original debts, the application of the 4th section of the Statute of Frauds to such a promise depends upon whether or not the third person remains liable to the creditors notwithstanding such promise (c). If the third person remains liable then the promise is within the statute, otherwise it is not within it. Promises that third person shall pay agreed composition to his creditors, when within statute.

In *Emmet v. Dewhurst* (d), where W. D. by indenture agreed to guarantee a certain composition to all the creditors of J. D. who should before a fixed day execute a *release* of their debts, it was held that this was an agreement required by the 4th section of the Statute of Frauds to be in writing, and that its terms could not, therefore, be varied by *parol*. Now, in this case it appears that J. D. continued liable for the amount of the composition, notwithstanding the *Emmet v. Dewhurst*.

(b) 4 Exch. 530.

(c) The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), provides that where a debtor intends to make a proposal for a composition or scheme of arrangement, he shall set out in such proposal "particulars of any sureties or securities proposed." (Sect. 3 (1).)

(d) 3 Mac. & G. 587.

RULE I.
Ante, p. 66.

promise of W. D., for each creditor, on executing the deed of release, received in pursuance of the agreement the *joint* notes of J. D. and W. D. for the proportionate part of the debt due to the creditor. Vice-Chancellor *Knight-Bruce*, in his judgment in this case, says: "It is a special promise to answer for the debt of another person. It is not a promise, upon good consideration, to take the debt *exclusively* upon himself. It professes in terms to be a case of guarantee. The composition notes were to be the joint notes of J. D., the principal debtor, and of the defendant W. D., as his guaranty or surety. The agreement is clearly within the 4th section of the Statute of Frauds, and must be in writing. Any alteration of the agreement must also be in writing."

Anstey v.
Marden.

In *Anstey v. Marden* (a), A. being insolvent, a verbal agreement was entered into between several of his creditors and B., whereby B. agreed to pay the creditors 10s. in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to B. It was held, that this agreement was not within the 4th section of the Statute of Frauds. Now, there can be no doubt that this decision is perfectly correct, for the effect of the transaction in question was to substitute B. as debtor in lieu of A. Consequently, the promise of B. was an original promise. It was, in short, a contract to purchase the debts of the several creditors, instead of being a contract to answer for the debts owing by A. As *Mansfield*, C.J., said, "The creditors agreed to accept 10s. in the pound from B. in *full satisfaction* of their debts, and undertook to assign their debts to him" (b).

Cases in
 which there
 being no

On the other hand, there are very many cases in which effect has been given to the other branch of this

(a) 1 B. & P. N. R. 124.

(b) See also *post*, p. 103, where another reason is given for excluding this case from the operation of the Statute of Frauds.

part of the rule, and it has been held, that, it appearing, under the circumstances, that there was no third person liable—in other words, that there was no principal debtor—the Statute of Frauds had no application whatever. Thus, for example, in the case of *Tomlinson v. Gill* (c), it was held, that a promise by the defendant, that, if the widow of the intestate would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets to pay debts, was not within the 4th section of the Statute of Frauds. Now, it is submitted that under no circumstances could such a promise be within the 4th section of the Statute of Frauds. It clearly cannot be maintained for a moment that A.'s widow, to whom the promise in question was made, was a *creditor*, and this circumstance of itself, as will presently be seen (d), is sufficient to exempt the promise from the operation of the statute. But it may perhaps be said that A.'s widow occupied the position of *principal debtor*. Now, even assuming this to be the case, the Statute of Frauds would have no application, since it does not operate upon promises made to principal debtors (e). It is, however, submitted that, inasmuch as at the time the promise was made A.'s widow had not taken out letters of administration, she was not even a *principal debtor*. For though an executor may act before probate, "with respect to an administrator, the general rule is, that a party entitled to administration can do nothing as administrator before letters of administration are granted to him, inasmuch as he derives his authority, not like an executor from the will, but entirely from the appointment of the court" (f). If, therefore, A.'s widow did not in fact occupy the position of principal debtor, another reason

RULE I.
Ante, p. 66.

principal
 debtor
 statute held
 not to apply.
Tomlinson v.
Gill.

(c) Amb. 330. (d) See *post*, Rule II., p. 123. (e) See *post*, p. 123—124.

(f) Williams' Law of Executors, vol. i., 9th ed., p. 342; *Wankford v. Wankford*, 1 Salk. 299, 301, by POWYS, J.

RULE I.
Ante, p. 66.

why the promise in question is not within the Statute of Frauds is, because the promise of the defendant is not to answer for the debt of another, but to answer for the sufficiency of the assets of an intestate, or, in other words, it is a promise to answer for the debts of a *deceased person*.

It is right, however to mention that Lord Chancellor *Hardwicke*, in excluding this case from the operation of the Statute of Frauds, grounded his decision on the alleged distinction "between a promise to pay the original debt, and on the footing of the original contract, and where it is on a new consideration" (a).

Lexington v.
Clarke.

In *Lexington v. Clarke* (b), the promise was somewhat similar to that in *Tomlinson v. Gill*. In consideration of the plaintiff allowing the widow of A. B. to retain possession of certain premises which the plaintiff had demised to A. B., the widow of A. B. (who was also his executrix) promised to pay to the plaintiff the arrears of rent due to the plaintiff from A. B. at the time of his death, and also 260*l.* more. It was held, that the promise to pay the arrears of rent due from A. B., deceased, was within the 4th section. For the reasons above stated it is submitted that this decision is erroneous. Under the following circumstances, moreover, it was for similar reasons held, that no note in writing was required. An action was brought against a sheriff for taking the plaintiff's goods on a *fi. fa.* against a third person. The sheriff failed on the trial, and the *execution creditor* then employed an attorney to apply for a new trial, and (on obtaining a rule for a new trial) to act as attorney on the second trial. It was held, that the attorney could recover his bill against the *execution creditor*, although there was no memorandum in writing. *For the execution creditor was*

(a) See this distinction commented upon, *post*, p. 132 *et seq.*

(b) Vent. 223.

the person primarily liable to him. But if the attorney had in the first instance been employed *by the sheriff*, it would have been otherwise (c). RULE I.
Ante, p. 66.
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The case of *Houlditch v. Milne* (d) appears to be regarded by some text writers as being another example of the principle now under consideration. There the plaintiff had a lien on certain carriages belonging to A., for the costs of repairs which he had done to them. The plaintiff parted with such lien and gave up the carriages, on the defendant's promising to pay what was due for such repairs from the person in whose name the bill for such repairs had been made out. After the promise of the defendant, the plaintiff appears to have made out the bill in the name of the defendant. It was held, that the 4th section of the Statute of Frauds did not apply. This case, which we shall have occasion to notice at greater length in another part of this book, is very badly reported. It is only cited in this place because in 1 Wms. Saund. 233 it is stated that the reason the statute did not apply was, because credit was given to the defendant and not to the owner of the carriages, who was not therefore liable to the plaintiff at all. There was, in fact, no principal debtor. *Houlditch v. Milne.*

The case of *Walker v. Hill* (e) may be cited as another instance of the rule that there must be a principal debtor. In that case, one *Hulls*, who was agent for the plaintiffs, being desirous of retiring, the defendant applied for the agency. *Hulls* was indebted to the plaintiffs, and, on the other hand; claimed a commission for introducing customers. It was agreed that the plaintiffs should allow *Hulls* 52*l.* on that account, and that the defendant, on taking the agency, *Walker v. Hill.*

(c) *Noel v. Hart*, 8 C. & P. 230.

(d) 3 Esp. 86. See also *Castling v. Aubert*, 2 East, 325.

(e) 5 H. & N. 419.

RULE I.
Ante, p. 66.

should allow the plaintiffs to retain six months' salary, which amounted to 52*l.* In an action by the plaintiffs for money received by the defendant as such agent, to which the defendant pleaded a set-off for six months' salary, it was held, that this was not an undertaking to answer for the debt of another within the 4th section of the Statute of Frauds. The ground on which it was insisted that the Statute of Frauds applied was thus stated by the defendant's counsel (a):—He said, "The agreement is one which is required by the Statute of Frauds to be in writing. The plaintiffs say, 'If you will enter our service, and allow us to retain twenty-six weeks' salary, we will give *Hulls* 52*l.*, whereby so much will be wiped off the debt due from him to us.' The defendant, by assenting to that, undertakes to answer for so much of the debt of *Hulls*. It is an agreement to give the value of service for a certain time, to be applied in reduction of a debt due from a *third person* to the plaintiffs." *Pollock*, C.B., in giving judgment in this case, said: "If a person agrees that whatever shall hereafter become due to him shall be disposed of in a particular way, such an agreement need not be in writing." Stripped of immaterial details and placed upon a broad ground, the transaction seems simply to have amounted to a purchase by the defendant of the agency from the plaintiff at a certain price, the plaintiff being guided in fixing the price by a wish to make good the loss he had sustained by his former agent. In this view of the case the *old* agent had really nothing to do with *the contract* (as such), and there was therefore not any principal debtor.

There is another class of cases which is sometimes considered referable to the principle that the statute only applies where there is a principal debtor. These

Promises to
 pay rent in
 arrear if
 landlord will
 not distrain.

(a) Mr. Hopwood.

are cases in which a person makes a promise to a landlord, in consideration of his desisting from distraining for rent in arrear. In such cases the promise need not be in writing. Thus, in the case of *Edwards v. Kelly* (b), after goods had been *actually distrained* for rent, the plaintiff consented to give them up to one of the defendants, upon all the defendants giving a joint undertaking to pay to the plaintiff all such rent as should appear to be due from the tenant. It was held that this agreement was not within the Statute of Frauds. *Bayley, J.*, in his judgment in this case, said, that after the plaintiff had distrained, he held in his own hands the remedy for recovering the rent, *and the tenant was at that time no longer indebted*; for so long as the landlord held the goods under distress, the debt due from the tenant was *suspended*. One reason (c), therefore, for this decision was that there was no principal debtor.

RULE I.
Ante, p. 66.

Edwards v. Kelly.

The earlier case of *Williams v. Leper* (d) is very similar to *Edwards v. Kelly*. The circumstances, indeed, are exactly similar, except that in *Williams v. Leper*, when the promise of the defendant was made the goods had *not* been actually distrained. It was held that the 4th section of the Statute of Frauds did not apply. The following judgment was delivered by the majority of the judges who decided this case:—
“This is not a promise to pay the debt of another; the goods were debtor, and the defendant was in the nature of a bailiff for the landlord, and, if the defendant had sold the goods and received money for them, an action

Williams v. Leper.

(b) 6 M. & S. 204. See *per* CLEASBY, B. in *Lehain v. Philpott*, L. R. 10 Ex. at pp. 247, 248, for comment on this case.

(c) *Vide post*, p. 132, for another reason.

(d) 2 Wils. 308; 3 Burr. 1886. This case is also cited under Rule III., at p. 137, where it will be seen that there is another reason why the 4th section of the Statute of Frauds does not apply to it. See also p. 160.

RULE I.
Ant. p. 66.

for money had and received for the plaintiff's use would have laid." Mr. Justice *Aston*, however, thought that if the goods had not sold for so much money as the plaintiff's rent he would be liable for no more than they sold for.

Thomas v.
Williams.

Lord *Tenterden*, C.J., in *Thomas v. Williams* (a), said: "In *Williams v. Leper* there was no actual distress, but there was a power of immediate distress, and an intention to enforce it; and I think the judges must be understood to have considered that power *as equivalent to an actual distress*. It is not necessary now to decide whether it was rightly so considered." In *Bampton v. Paulin* (b), too, where *Williams v. Leper* is followed, the promise was made *before* the goods had been distrained. It would seem, therefore, that, whether the promise is made *before* or *after* the distress, the statute does not apply, because, at the time the promise is made, there is no principal debtor other, indeed, than the *goods* themselves.

Love's Case.

Love's Case (c), it is presumed, rests upon the same principle as the cases just cited. There the sheriff had taken goods in execution upon a *fi. fa.*, and a promise to the officer, by a third party, to pay him the debt, in consideration that he would restore them, was held to be an original promise not within the 4th section of the Statute of Frauds.

Promise to
 pay a debt
 out of fund
 belonging to
 debtor is not
 within
 statute.

A further example of the rule, that the Statute of Frauds does not apply unless there be a principal debtor, is furnished by a line of cases which decide that a promise made to a third person's creditors to pay the debt of that third person *out of the proceeds of a sale of that third person's goods* need not be in writing, and is

(a) 10 B. & C. 664, 670. See also remarks of BAYLEY, J., in *Edwards v. Kelly*, *supra*.

(b) 4 Bing. 264.

(c) 1 Salk. 28. This case is also cited *post*, p. 129, under Rule II, and at p. 157, under Rule V.

not within the 4th section of the Statute of Frauds. Such a promise is not a promise to answer for the debt of another person, but a promise to answer for the sufficiency of a certain fund, or for the due application of such fund, as the case may be. In such a case, you undertake or promise, *not for another*, but for *yourself*. You undertake, not that *another* shall pay out of the proceeds of the sale, but that you yourself will do so. Consequently, there is no one liable, or to become liable, in the first instance, to do that which you promise or undertake to do, and, thereupon, the operation of the 4th section of the Statute of Frauds is excluded by the rule now under consideration. If it is a promise to answer only for the *application* of a certain fund to the payment of the debt due to the promisee from the third person, it seems that the party making such a promise is not liable for a greater sum than the goods may realize by the sale (*d*). In *Williams v. Leper* (*e*), where the promise of the defendant was to pay rent due to the plaintiff from a third party out of the produce of the sale of that third party's goods; in *Edwards v. Kelly* (*f*), where the promise was almost the same as in *Williams v. Leper* (*g*); in *Bampton v. Paulin* (*h*), where the promise was "to pay rent out of the proceeds of sale"; and in *Stephens v. Pell* (*i*), where the promise was to pay the sum due for rent "out of the produce of the effects," the Statute of Frauds, s. 4, was held to have no application.

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There is also a class of cases, greatly resembling those just cited, which proceed on the same principle, and therefore further exemplify the present rule. These are cases in which, in consideration of goods supplied on credit to a third person, the defendant has

Promise to pay another's debt out of debtor's money when received by promiser,

(*d*) *Stephens v. Pell*, 2 C. & M. 710; but see *Williams v. Leper*, 2 Wils. 308.

(*e*) *Ubi supra*.

(*g*) *Supra*.

(*h*) 4 Bing. 264.

(*f*) 6 M. & S. 204, 208, *ante*, p. 79. ... (*i*) 2 C. & M. 710.

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whether
 within
 statute.

promised to pay for such goods out of certain moneys about to be received by him (the defendant) for such third person. Now in these cases the promise is really nothing more nor less than a promise to pay the *third party's debt with the third party's money*, for, when the promise is made, it is known whether the money to be received will be sufficient in amount to cover the debt. The person giving such a promise or undertaking does not therefore undertake any responsibility whatever, and certainly does not stand in need of the protection afforded by the Statute of Frauds. His engagement, like that of a person who undertakes to pay another's debt out of the produce of the sale of such other's goods, is not that the principal debtor shall pay, or, in default, that he himself will do so, but that he himself will pay out of moneys coming to him for such other person. In such cases there is, in fact, *no third person answerable, in the first instance, for the debt or default guaranteed against*, for it is the promiser who undertakes that *he himself* will apply, in a certain way, a third party's fund over which he (the promiser) has or is to have control. He does not undertake that *another* shall do this. In such cases, therefore, the event on which the liability of the promiser is to depend is, not the default of another, but the receipt by the promiser of a certain sum of money. The promiser's undertaking to pay out of a certain fund creates a privity of contract between himself and the third person's creditor, and enables the latter to maintain against the former an action for money had and received, and, where the appropriation in question is made with the debtor's consent, renders such appropriation irrevocable as far as the debtor is concerned.

Cases on this
 subject
 somewhat
 conflicting.

For the above reasons, it is submitted that the Statute of Frauds has no application to a promise to pay another's debt out of such other's funds when they

shall be received by the promiser in consideration of goods to be supplied to such other person on credit. However, on an examination of the authorities it will be found that, in the *two English* cases referred to below of *Andrews v. Smith* and *Dixon v. Hatfield*, in which this view was adopted, the goods were supplied on the *sole credit* of the promiser, and, therefore, for this reason alone, the statute could not apply, whilst, in the one case in which this view was *not* adopted, namely, *Morley v. Boothby*, credit was given to a third party. Thus, in *Andrews v. Smith* (a), one *Hill* was employed to do certain work, and the defendant was appointed surveyor over him, and to receive moneys due to *Hill* for such work. The defendant promised the plaintiff, in consideration that he would deliver to *Hill* materials as he might require to enable him to do the work in question, that he (defendant) would pay him for them out of such moneys received by him (the defendant) as should become due to *Hill* for the work, if *Hill* would give him an order for that purpose. The promise of the defendant was held to be original, and therefore not within the Statute of Frauds. Now, in this case it appeared that there was nothing on the face of the declaration to imply a contract by the plaintiff with *Hill*, i.e., there was no principal debtor. Lord *Abinger*, C.B., however, while admitting that this was an answer to the objection raised by the defendant, went on to say: "But further, if the defendant contracted, not to pay *Hill's* debt out of his own funds, but only faithfully to apply *Hill's* funds for that purpose when they should come to his hands, that contract would not be within the operation of the statute." *Parke*, B., too, said: "There is nothing on the face of the declaration to imply a contract by the plaintiff with *Hill*. If that be so, it is clear the defendant's contract was an original, not a collateral one, and so not within the statute. But

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Andrews v. Smith.

(a) 2 Cr. M. & R. 627.

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Ante, p. 66.

Dixon v.
Hatfield.

even if that were otherwise, this is nothing more than a prospective assignment of funds which were to come to the defendant's hands for *Hill*, and an attornment, as it were, by the defendant to that assignment; and the authorities show that in such case the contract is not within the statute. On this ground also, the plaintiff is entitled to the judgment of the court." In *Dixon v. Hatfield* (a), W. undertook to complete the carpenter's work in the defendant's house, and find all materials. W. being delayed for want of credit or funds to procure timber, it was supplied by M. on the defendant's signing the following undertaking: "I agree to pay M. for timber to house in A. C. out of the money that I have to pay W., provided W's work is completed." It was held, that this was not a guarantee to pay if W. should fail, but a direct undertaking to pay when the work should be completed. Now here, again, it does not appear that there was any contract between M. and W., and Mr. Justice *Park*, in his judgment, seemed to think that, had this been the case, the defendant's promise would have amounted to a guarantee. On the other hand, Mr. Justice *Gaselee* intimated that, even if credit had been given by M. to W., the defendant would have been liable, as he undertook to pay for the timber on the completion of the work.

In the *American* case of *Towné v. Grover* (b), it was held that a promise by one who owes money to a party about to be sued that he (the promiser) will not pay without giving notice to the creditor, so that the latter may have an opportunity to attach the debt, is outside the 4th section of the Statute of Frauds.

Morley v.
Boothby.

In the case of *Morley v. Boothby* (c), the defendants promised the plaintiffs that, if they would deliver to A. B. certain goods, etc., to the value of 174*l.* 13*s.* 5*d.*, required for the building of St. Philip's Church, to be

(a) 2 Bing. 439; 10 Moore, 24. (b) 9 Pick. 306. (c) 3 Bing. 107.

paid for by bill of exchange to be drawn by the plaintiffs on A. B., the said bills should be paid, at maturity, *out of money to be received from St. Philip's Church*. It seems to have been admitted that the promise was within the Statute of Frauds, and the only question for the decision of the court was, whether a certain agreement was a sufficient memorandum in writing to satisfy the 4th section of the Statute of Frauds, and the court held that it was not, on the ground that no consideration appeared on the face of the agreement. Now, in this case, as pointed out by Lord Abinger, C.B., in *Andrews v. Smith*, *supra*, there could be no doubt that A. B. was indebted to the plaintiffs—in other words, that there was a third person who was primarily liable to pay the debt. The question, however, whether the defendant had assumed a liability to see that such third person paid, or had merely undertaken to apply the funds coming from St Philip's Church to the payment of the debt, was not (as has been observed) argued at all. The decision of the court does not, therefore, touch the principle of the decisions which we have just been considering.

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Ante, p. 66.
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In the recent case of *Guild & Co. v. Conrad* (*d*), where the defendant *orally* promised the plaintiff that, if he, the plaintiff, would accept certain bills for a firm in which the defendant's son was a partner, he, the defendant, would provide the plaintiff with funds to meet the bills, it was held by the Court of Appeal (affirming the decision of *Mathew, J.*) that the promise was not within the 4th section, and therefore binding, though not in writing.

In the following cases, it is submitted, it will also be found that the promise or undertaking of the defendant was for himself, and not for another, and that there was no one liable, in the first instance, to the plaintiff, within the meaning of Rule I. They are all instances in which

Promises in consideration of stay or withdrawal of proceedings against third party.

(*d*) (1894) 2 Q. B. 885, C. A.

RULE I.
Ante, p. 66.
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Jarmain v.
Algar.

the defendant's promise was made in consideration of proceedings against a third party being stayed or withdrawn, and in which, therefore, at first sight, the statute might appear to apply. Thus in *Jarmain v. Algar* (a), the defendant promised to sign a bail bond for a defendant in a civil action, in consideration of the plaintiff forbearing to arrest such defendant on a suit already sued out. But it was held, that this promise was not within the 4th section of the Statute of Frauds. For, as will not have escaped the reader's notice, the undertaking was that defendant *himself* would sign the bail bond, not that *another* should do so.

Read v. Nash.

So, also, it had been previously decided, in the case of *Read v. Nash* (b), that a promise by C. to A. to pay him 50*l.* and costs if he would withdraw the record in an action of assault brought by A. against B., need not be in writing, as it is not a promise within the Statute of Frauds. *Lee*, C.J., in his judgment in this case, says: "The single question is, whether this promise, which is confessed by the demurrer not to have been in writing, is within the Statute of Frauds and Perjuries, that is to say, whether it be a promise for the debt, default or miscarriage of another person? And we are all of opinion that it is not, but that it is an original promise, sufficient to found an *assumpsit* upon against *Nash*, and is a lien upon *Nash*, and upon him only. *Johnson* was not a debtor; the cause was not tried; he did not appear to be guilty of any default or miscarriage; there might have been a verdict for him if the cause had been tried, for anything we can tell; he never was liable to the particular debt, damages, or costs. The true difference is between an *original* promise and a *collateral* promise; the *first* is out of the statute, the *latter* is not, when it is to pay the debt of another which was already contracted."

(a) 2 C. & P. 249.

(b) 1 Wils. 305.

In *Chater v. Becket* (c), Lord Kenyon, C.J., referred to the case of *Read v. Nash*, *supra*, and seemed to approve of it.

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Chater v.
Becket.

In 1 Wms. Saund. p. 231, however, it is stated that *Read v. Nash* is in effect overruled by *Kirkham v. Marter* (d). The facts of *Kirkham v. Marter* are as follows:—A. had ridden the plaintiff's horse without his leave, and thereby caused his death, and the defendant (the father of A.) promised to pay the plaintiff the damage he had sustained, in consideration of the plaintiff forbearing to sue A.: it was held, that the defendant's promise was void, not being in writing; but *Abbott, C.J.*, in delivering his judgment, expressly recognized *Read v. Nash*, distinguishing *Kirkham v. Marter* from it. He says: "The case of *Read v. Nash* is very distinguishable from this; the promise there was to pay a sum of money as an inducement to withdraw a record in an action of assault brought against a third person. It did not appear that the defendant in that action had even committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original and not a collateral promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consideration of the plaintiff's forbearing to sue the son."

Kirkham v.
Marter.

It is submitted that the distinction between the two cases is perfectly clear. In *Read v. Nash* the promise simply was, "forbear to proceed with the action you have commenced against A. and I will pay you 50*l.*" In *Kirkham v. Marter* it was, "do not make A. pay for his default, and I will do so myself."

The older case of *Fish v. Hutchinson* is much the same in effect as *Kirkham v. Marter*. In *Fish v. Hutchinson* (e) the plaintiff declared that, whereas one

Fish v.
Hutchinson.

(c) 7 T. R. 201.

(d) 2 B. & A. 613.

(e) 2 Wils. 94.

RULE I.
Auth. p. 66.

A. was indebted to him in a certain sum of money, and he had commenced an action for the same, the defendant, in consideration that the plaintiff would stay his action, promised to pay the money due to him by A. Demurrer and joinder. *Et per totam curiam*: "This case is very clearly within the statute; for here is the debt of another party still subsisting, and a promise to pay it. It is not like the case of *Read v. Nash*. In that case there was no debt in another, it being an action of battery; and it could not be known, before trial, whether the plaintiff would recover any damages or not. But, in the present case, there is the debt of another still subsisting, and a promise to pay it." It is quite possible to distinguish *Read v. Nash* from *Fish v. Hutchinson*. For in *Read v. Nash* the promise of the defendant was to pay 50*l.* and costs. On the other hand, in *Kirkham v. Marter* and *Fish v. Hutchinson*, the defendants promised not to pay the plaintiff a fixed sum of money, but something that a third person was liable to pay. In the following case of *Bird v. Gammon* (*a*) it will be seen that *Read v. Nash* was followed. In *Bird v. Gammon* the facts were as follows:—The plaintiff having issued execution against *Lloyd* for debt, *Lloyd*, with the assent of the plaintiff, conveyed all his property to the defendant, who thereupon undertook to pay the plaintiff the debt due from *Lloyd*, plaintiff withdrawing the execution. It was held, on the authority of *Read v. Nash*, *supra*, that the defendant's undertaking was not within the 4th section of the Statute of Frauds. *Tindal*, C.J., thus described the transaction: "It appears, then, that the plaintiff, with the consent of *Lloyd* and the defendant, had relinquished his execution against *Lloyd*, to look to the defendant; that the defendant admitted his liability when the account was presented; and that the jury found such to have been the agreement between

Bird v.
Gammon.

(*a*) 3 Bing. N. C. 883.

the parties. No objection, therefore, can be raised on the Statute of Frauds, for this is not an agreement to pay the debt of a third person, but an agreement that if the plaintiff would forego his claim on *Lloyd*, the defendant would pay the amount of his debt on his own account. The case, therefore, falls within the principle of *Read v. Nash* (b) It is objected that the plaintiff, if he fails in this action, may still sue *Lloyd* or issue execution; but if he were to do so, *Lloyd* might show on plea or *audita querela* that on good consideration the plaintiff gave up his remedy against *Lloyd*, and took the defendant's liability instead; which, though not properly accord and satisfaction, would be a complete defence on the general issue. *Good v. Cheeseman* (c), and the cases there cited."

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Ante, p. 66.

In the case of *Bushell v. Beavan* (d) we have an instance of a promise which, at first sight, would appear to obviously fall within the Statute of Frauds. For the promise was "to procure the signature of a third person to a guarantee" (e). And this would seem to be, in effect, an undertaking that the third person shall do a certain thing, namely, sign the guarantee. Here, again, no person "other than the defendant himself was ever liable on the promise sued upon." The facts were as follows:—The plaintiffs, owners of a ship hired on charter-party by *H. Semphill*, refused to let her sail till certain disputes about the freight between them and *H. Semphill* were settled by *H. Semphill* giving security; whereupon the defendant, in consideration that the plaintiffs would let *H. Semphill's* ship sail, without giving security, undertook to get *P. Macqueen* to sign a guarantee and deliver it to the plaintiffs in a week. The guarantee,

Promise to procure the signature of a third person to a guarantee not within statute.
Bushell v. Beavan.

(b) 1 Wils. 305.

(c) 2 B. & Ad. 328.

(d) 1 Bing N. C. 103.

(e) As to promises to give a guarantee, see *Mallet v. Bateman*, L. R. 1 C. P. 163; *Wallace v. Gibson* (1895), A. C. 354, *ante*, p. 60.

RULE I.
Ante, p. 66.
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which it was promised that *P. Macqueen* should sign, ran as follows: "Whereas *H. Semphill* has hired your ship for six months from July 12th, 1830, and such longer time as his intended voyage may require, and has paid or secured the freight for six months from August 20th, 1830, and is about to leave England, I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months." And the court held, that this guarantee was within the Statute of Frauds. Nevertheless, the court also held—and as it is submitted rightly held—that the defendant's promise to procure *Macqueen's* signature to this document *did not* fall within the statute. *Tindal*, C.J., in the course of his judgment, said: "The promise on which the first count is framed is an immediate undertaking by the defendant to get a copy of a guaranty which is written above it, duly signed by Mr. *Potter Macqueen*, and within a week afterwards delivered to the plaintiff's agent. The immediate consideration for that promise was the removal by the plaintiff of a stop which they had put upon the vessel, then lying in St. Katherine's Docks, and the permitting her to sail on the voyage before the security was signed. Under these circumstances the contract appears to us not to be a contract to answer for the debt, default, or miscarriage of any other person, but a new and immediate contract between the defendant and the plaintiffs. If Mr. *Macqueen* had signed the guaranty, that guaranty would, indeed, have been within the Statute of Frauds; for his is an express guaranty to be answerable for the freight due under the charter-party if *Semphill* did not pay it. But no person could be answerable on the promise to procure his signature but the defendant. *Semphill* had never engaged to get the guaranty of *Macqueen*, nor had *Macqueen* engaged to give it. There was, therefore, no default

of anyone for which the defendant made himself liable; but he did so simply on his own immediate contract. For, as to any default of *Semphill* in paying the freight, the action, on the undertaking of the defendant, could not be dependent on that event; for it would have been maintainable if the guarantee were not signed at any time after the day on which the defendant engaged it should be given, that is, long before the time when the freight became payable." The ground of the decision, as stated in the judgment of the court, may be briefly stated to be, that, from *the very nature of the case*, it was impossible that anyone could be liable to the plaintiff *simultaneously* with the defendant. For, as soon as the liability of the third person (*Macqueen*) commenced, by his signing the guarantee, the liability of the defendant *ceased*, and, until the third person signed the guarantee, obviously there could be no one liable but the defendant.

RULE I.
Ante, p. 66.

Again, in the old case of *Elkins v. Heart* (a), just as in *Bushell v. Beaven*, the promise was *seemingly* to answer for another within the Statute of Frauds. There the plaintiff having sued J. G., the defendant's son-in-law, for money due from him to the plaintiff for diet and lodging, the defendant, in consideration that the plaintiff would forbear to sue the said J. G. for the said sum, promised that the said J. G. should not leave the kingdom without paying the same. The court inclined to the opinion that this case was not within the 4th section of the Statute of Frauds. Now, in this case, it will be observed that the terms of the engagement of the defendant simply were that J. G. should not leave the kingdom without paying his debt. But it does not appear that J. G., by leaving the kingdom, incurred any liability to the plaintiff. Consequently there was no principal debtor or defaulter

Promise that a third person shall not leave the kingdom without paying his debt not within statute. *Elkins v. Heart*.

RULE I.
Auto, p. 66.

within the meaning of Rule I. The event on which the liability of the defendant was to attach, namely, J. G. leaving the country without paying his debt, would not make J. G. liable to the plaintiff. Just as, on the other hand, the failure of J. G. to pay his debt (provided he did not leave the country) would not render the defendant liable to J. G. The decision may, in a word, be put upon the ground that the defendant's promise was that J. G. should not leave the kingdom; but J. G. made no such promise, and therefore no one but the defendant himself was ever liable upon the promise in question.

Promises to indemnify third persons against costs of litigation undertaken at promisee's request.

The following cases, again, form another class to which the Statute of Frauds has no application, because there is no other person liable but the defendant himself. It frequently happens that one person is induced, at the request of another, to defend or commence some legal proceeding in consideration of a promise by the person making such request, to indemnify him against the costs of the suit (*a*). In these cases it is submitted that the 4th section of the Statute of Frauds has no application. The foundation of a promise to answer for the debt, default, or mis-carriage of another is the present or future liability of a third person in the first instance to the promisee. Take away this liability, and not the Statute of Frauds, but the *lex contractus*, puts an end to the contract (*b*), which cannot survive the loss of its *essential* ingredient, the liability of a third person. Now, in the present class of cases, it will be observed, on examination, that the foundation of the contract is not, as in the

(*a*) Without such an indemnity a person is not of course usually bound to take legal proceedings for the benefit of another at his own cost and risk. See *Williams, Torrey & Co. v. Knight, The Lord of the Isles*, (1894) P. D., p. 342.

(*b*) *Per* WILLES, J., in *Mountstephen v. Lakeman*, L. R. 7 Q. B. 197; 7 H. L. 17.

case of a guarantee, the present or future liability of a third person to the promisee. True, such a liability *may* arise, but *whether it arises or not* the promiser is equally liable, whereas in the case of a guarantee, as already pointed out, if it does not arise, the contract is at an end for loss of one of its *essential* ingredients. To make this still clearer:—If a person at your request defends or commences an action, and you engage to indemnify him, you are liable on your engagement whether he is successful or whether he prove unsuccessful. But it is *only in the former event* that a third person is liable in the first instance, for, unless you succeed, your adversary has not to pay you either costs or damages. In the latter event the promisee has to pay at least his own costs, and these are covered by your indemnity, which exists, though the liability of a third person has *not* arisen, because such a liability is an *accidental*, and not, as in the case of a guarantee, an *essential* ingredient of such a contract. Accordingly, in consonance with these principles, in the case of *Bullock v. Lloyd* (c), it was held that the promise of an indorser of a dishonoured bill of exchange to indemnify a subsequent indorsee against costs, if he would bring an action against the acceptor, would certainly not require to be in writing. The only case which seems to militate against this view is *Winckworth v. Mills* (d), where it was decided that a promise by the indorser of an unpaid note to indemnify the holder if he would proceed to enforce payment against the other parties on the note, must be in writing, or it would be void under the Statute of Frauds. Much importance cannot, however, be attached to this latter case, which was decided at *Nisi Prius* many years ago, and which is at variance with modern authorities, though it has never been

RULE I.
Ante, p. 66.
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(c) 2 C. & P. 119,

(d) 2 Esp. 484,

RULE I.
Ant. p. 66.

Howes v.
Martin.

expressly overruled. Besides, Lord *Kenyon* offered to save the point, but the plaintiff's counsel declined. Moreover, the case of *Howes v. Martin* (a) is an authority to the same effect as *Bullock v. Lloyd*. In *Howes v. Martin* plaintiff had accepted a bill for 20*l.* for the accommodation and on account of the defendant. This bill was not taken up by the defendant when due, and the defendant accordingly prevailed upon the holder of the bill to accept 16*l.* in part and the plaintiff's acceptance for six guineas (being the balance due on the bill, including the interest then due) for the remainder. This bill for six guineas not being paid when due, the holder of the bill brought an action on it against the plaintiff as the acceptor. On the action being brought, plaintiff acquainted the defendant with the circumstance, and he desired the plaintiff to defend the action. In consequence of this representation plaintiff did accordingly defend, when the holder of the bill obtained a verdict for the amount of the bill, which, with costs, amounted to 32*l.* To recover this sum the plaintiff brought an action of assumpsit for money laid out and expended to the use of the defendant, declaring on the common counts. At the trial it was objected that, under the Statute of Frauds, this action was not maintainable, inasmuch as there was no note in writing, and the object of the action was to recover from the defendant a sum of money which was the debt and costs in an action against the plaintiff herself on her own acceptance, and which, therefore, was to be deemed her own debt. In support of this view a case of *Hitchcock v. Hicks* was cited, which was said to have been decided before Lord *Kenyon*. This case does not, however, appear to be reported anywhere. Lord *Kenyon* over-

(a) 1 Esp. 162.

ruled the objection in the present instance, and held that the case was not within the Statute of Frauds. He said that it appeared that the plaintiff never had any consideration whatever for her acceptances, which were given merely on the defendant's account and for his use; that the defence to the action on the note was on his account, and from whence he could have derived a benefit; that as he, therefore, was *personally interested*, and directed the defence to be made by which he might have been benefited, the money must be considered to have been laid out by the plaintiff on his account and to his use, and that the plaintiff, therefore, was entitled to recover it from him.

RULE I.
Ante, p. 66.

To the same effect, also, is the case of *Adams v. Dansey* (b). There the plaintiff, an occupier of land, at the request of the defendant, and upon a promise of indemnity, resisted a suit of the vicar for tithes. It was held, that the defendant's promise was not a promise required by the Statute of Frauds to be in writing. Now, the ground of this decision is, that the promise was not an undertaking for the debt, default or miscarriage of another, but was for a liability to which the plaintiff himself was to be exposed at the request of the defendant. This case, therefore, so far resembles the case of *Eastwood v. Kenyon* (c), (which will be cited hereafter to show that the promise is not within the statute unless made to the creditor) that it is a promise made to the debtor and not to the creditor. But it differs from that case in this, that here the promise was not, as in *Eastwood v. Kenyon*, to pay the promisee's debt to the creditor of the promisee, but to pay the promisee himself the expenses which he might incur at the promiser's request. It is, therefore, submitted that the true reason for excepting such a promise from the operation of the 4th section of the Statute of Frauds is

(b) 6 Bing. 506; 4 M. & P. 245.

(c) 11 A. & E. 438.

RULE I.
Allen, p. 66.

because it amounts to a promise to pay the promiser's own debt.

Promise by a partner to his firm to pay his son's debt due to the firm, if the son should make default, need not be in writing.

It would *seem* that an undertaking in the following terms, namely, "I promise the firm of which I am a member that if my son S. does not pay the debt which he owes to the firm, I will pay it," is not a guarantee within the 4th section of the Statute of Frauds, and is, moreover, a promise unintelligible as a matter of law and as a matter of business (a).

Promises to be jointly liable with another not within statute.

There is another class of cases governed by the rule that the Statute of Frauds does not apply unless there is a principal debtor. It sometimes happens that a transaction has the appearance of being a contract between debtor, surety and creditor, but is not so in reality. If it should appear, by evidence, that such was not the nature of the transaction, and that the alleged principal debtor and surety are, in fact, nothing more than *joint* debtors, the operation of the 4th section of the Statute of Frauds will be excluded.

Batson v. King.

Thus, in *Batson v. King* (b), it was held that a promise made by the defendant, that, if the plaintiff would draw a bill, to be accepted by one *Dalton* and *indorsed by the defendant*, he (plaintiff) should not be called upon, need not be in writing, under the 4th section of the Statute of Frauds. *Martin*, B., delivered the following judgment:—"As between the holder of the bill of exchange and the parties whose names were on it, *Dalton*, as acceptor, was primarily liable, and the drawer and indorser stood in the relation of sureties for him. *But as between the parties, it may always be proved what is the real nature of the transaction.* As between themselves, *Dalton* and the defendant were the real principals. The plaintiff, having paid the bill, had a right to sue the defendant for money paid to his use. The Statute of Frauds has no application to the case; and the question

(a) *Per* BOWEN, L.J., in *In re Hoyle, Hoyle v. Hoyle*, (1893) 1 Ch. at p. 99.

(b) 4 H. & N. 739.

in *Green v. Cresswell* does not arise here. It might have been otherwise if *Dalton* had been entirely separate from the defendant and the plaintiff had become responsible for *Dalton*, upon the defendant's promise to indemnify him. *Dalton* and the defendant, being both principals, the only answer which the defendant had was by a plea in abatement for the non-joinder of *Dalton*." The effect of this decision really is, that, where the actual transaction, though *apparently* resembling a guarantee, *really* is not one, the court will treat it as being outside the 4th section of the Statute of Frauds. So it appears that if a man says to another, "If you will, at my request, put your name to a bill of exchange, I will save you harmless," this is not within the statute (c). "It is not a responsibility for the debt of another. It amounts to a contract by one, that if the other will put himself in a certain situation, the first will indemnify him against the consequences" (d).

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Ante, p. 66.

The rule that the 4th section of the Statute of Frauds only applies where, at the time the promise is given, the present or future legal liability of some third person is contemplated by both the promiser and the promisee, is further illustrated by cases in which the third person referred to is under disability. For a promise to answer for the debt, default or miscarriage of a person incompetent to contract, or not answerable for his wrongful acts, need not be in writing. Thus, in the case of *Harris v. Huntbach* (e), the plaintiff declared, first, for money lent and advanced by him at the defendant's request; and secondly, for money laid out and expended by the plaintiff at the defendant's request.

Promises
to be
answerable
for persons
under
disability.

Infants.

(c) *Per* POLLOCK, C.B., in *Batson v. King*, 4 H. & N. 739.

(d) *Ib.*

(e) 1 Burr. 373. See also *American* cases of *Chapin v. Lapham*, 20 Pick. 467; *Downey v. Hinchman*, 25 Ind. 453.

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The question upon the case reserved at the trial was, whether the evidence supported the declaration. A note of the defendant was produced in evidence by the plaintiff, in the following words:—"3rd December, 1751. Then received of Mr. *Harris* the sum of 19*l*. on the *behalf of my grandson*, which I promise to be *accountable for*, on demand. Witness my hand. *S. Huntbach*." It appeared that the grandson, on whose behalf the note was given, was an *infant*. Mr. Justice *Foster*, in giving his opinion, said: "The *infant* was not *liable*, and, therefore, it *could not* be a *collateral* undertaking. It was an *original* undertaking of the defendant to pay the money." So, also, from the old case of *Duncombe v. Tickridge* (a), decided in 24 Car. 2, it appears that an undertaking by a stranger to pay for "diet, lodging and apparel of an infant," is an original promise, which extinguishes the liability of an infant. Much importance cannot, however, be attached to this case, for it is apprehended that an undertaking to pay for necessities supplied to an infant, made on proper consideration, would amount to a *collateral* promise, within the 4th section of the Statute of Frauds, since the infant would himself be liable for necessities (b).

Promise to be
 answerable
 for a married
 woman.

Whether a promise by a person other than the husband to answer for the debt, default, etc., of a *married woman* was an original or a collateral promise, appears never to have been decided in England (c). However, there are two cases which throw some light

(a) *Aleyn*, 94.

(b) As to what are necessities, see *ante*, pp. 16, 17.

(c) *Gray v. Dowman*, 27 L. J. Ch. 702, was a case in which husband and wife joined in a mortgage of the wife's separate estate, and the husband joined, as *surety* for his wife, in a personal covenant for the repayment of the mortgage debt. The application of the 4th section of the Statute of Frauds did not, however, arise, as it was amply satisfied by the mortgage deed. See *American* cases of *Kimball v. Newall*, 7 Hill, 116; *Miller v. Long*, 45 Pennsylv. 350.

on this question, which, nevertheless, it is submitted, is no longer of more than academic interest, as, since these cases were decided, a married woman has become by statute capable of contracting *sui juris*, and, therefore, of occupying the position of principal debtor (*d*), though not, it is true, even now *personally* liable, save in respect of contracts made by her *before* marriage (*e*). The first of the two cases above mentioned is *White v. Cuyler* (*f*). There the defendant's wife, without any authority from the defendant, by articles of agreement, *under seal*, between herself and a Mr. *Low* of the one part, and the plaintiff of the other part, agreed to take the plaintiff with her to *Barbadoes*, as a waiting-maid, and also agreed, amongst other things, to pay the plaintiff's passage home to England, in case she (the defendant's wife) should dismiss the plaintiff from her service. The defendant's wife having dismissed the plaintiff, but not having paid the plaintiff's passage home to England, the plaintiff brought an action of *assumpsit* against the defendant. In moving for a rule to enter a non-suit (the verdict having passed for the plaintiff), it was, *inter alia*, contended at the bar that the action was wrongly conceived, if either the defendant or *Low* could be sued on the covenant contained in the above-named articles of agreement under seal. Lord *Kenyon*, in discharging this rule to enter a non-suit, said, "And, with regard to *Low*, the contract of a guarantee or surety under seal does not, by operation of law, extinguish the debt

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White v.
Cuyler.

(*d*) See *ante*, pp. 17, 18, where the position of a married woman under the Married Women's Property Acts is discussed.

(*e*) *Robinson; King & Co. v. Lynes*, (1894) 2 Q. B. 577. See also *Draycott v. Harrison*, 17 Q. B. D. 147; *Scott v. Morley*, 20 Q. B. D. 120, C. A. It would be outside the scope of this work to consider whether a married woman can *even now* contract with regard to her personal skill and labour, or enter into separate trading without her husband's consent, express or implied. See, as to these questions, Chitty on Contracts, 13th ed., p. 217.

(*f*) 1 Esp. 200; S. C., 6 T. R. 176.

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of the principal" (a). In this case, therefore, Lord *Kenyon* seems to have been disposed to treat *Low* as a surety, under the articles of agreement, though the principal debtor under such instrument was clearly (if any one) the married woman. Perhaps, however, it would not be incorrect to say that, in this case, the husband should be regarded as the principal debtor, though his liability did not certainly arise under the articles of agreement (b).

Darnell v.
Tratt.

The next case throwing light on the present question is *Darnell v. Tratt* (c). There, a married woman took her son to school, but no evidence was given of what passed at that time. Afterwards, a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for that he was answerable. It was held, that the Statute of Frauds, s. 4, did not apply, and that it was proper to leave it to the jury to say, under those circumstances, whether the *original credit* was not given to the uncle. In this case, therefore, though the alleged principal debtor was a married woman, it was thought proper to treat it as one presenting no extraordinary features, and make the nature of the uncle's liability depend on the answer of the jury to the question, *To whom was credit given* (d)? If, however, in this case the jury had found as a fact that credit was given to the *married woman*, in the first instance, the court would probably have held that the

(a) The defendant could certainly not have been sued on the articles of agreement, because he never authorized his wife to execute them at all, and supposing that he had done so, by writing *not under seal*, that would have been an insufficient authority to her to execute a deed. Moreover, supposing she had been authorized *by deed* to execute the said articles they would **not** have bound her husband, as she signed her own name instead of his.

(b) See last note.

(c) 2 C. & P. 82.

(d) In the case of *Maggs v. Ames*, too, cited *post*, p. 102, the fact of the principal debtor being a married woman does not appear to have been noticed, though coverture was pleaded in order to show a want of consideration.

transaction was within the Statute of Frauds, on the ground that the wife was acting as the implied agent of her husband. In a case decided long before recent legislation enabling a married woman to contract as a *feme sole*, to the extent of her separate property, it was held that an undertaking by a husband to pay a loan made to his wife, at his request, was not a collateral undertaking (e). Before the Married Women's Property Acts, the wife's contract was in fact inchoate and imperfect until affirmed by the husband; but the affirmation, when given, transferred the contract to him (f).

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Ante, p. 66.
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As a further corollary from the principle that a promise is not within the Statute of Frauds unless there be a third person who is primarily liable, it follows, as a general rule, that wherever the promise of the defendant has the effect of *extinguishing* or *releasing* the liability of the third person, it amounts to an *original* promise, and is therefore not within the 4th section of the Statute of Frauds. In such cases there is, in fact, no principal debtor. Thus, as under the old law the discharge of a debtor taken under a *ca. sa.* destroyed the debt, it was held that a promise to *pay* the debt for which a person was thus taken was not within s. 4 of the Statute of Frauds. For instance, in *Goodman v. Chase* (g), the plaintiff had taken A. B. under a *ca. sa.* The defendant promised to pay A. B.'s debt, in consideration of the plaintiff discharging him from custody. It was held that, as by the discharge of A. B. from custody, with the *consent* of the plaintiff, the debt itself was extinguished, the promise made in consideration of that discharge was an original promise. Lord *Ellenborough*, C.J., said: "By the discharge of *Chase* with the plaintiff's consent, the debt as between those persons was satisfied. . . . Then,

(e) *Stevenson v. Hardie*, 2 W. Bl. 872; and see *post*, p. 144.

(f) *Montagu Lush's Law of Husband and Wife*, 2nd ed., p. 323.

(g) 1 B. & A. 297.

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if so, the promise by the defendant here is not a collateral, but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and *Chase*. That being so, it becomes wholly unnecessary to consider the question arising out of the construction of the 4th section of the statute."

Butcher v.
Stewart.

In *Butcher v. Stewart* (a), where the promise was also in consideration of the discharge from custody of a third person arrested under a *ca. sa.*, *Goodman v. Chase* was followed.

Lane v.
Burghart.

So, again, in *Lane v. Burghart* (b), plaintiffs having taken one *Bacon* in execution for a debt, discharged him upon the following undertaking of the defendant: "In consideration of your discharging *Bacon* out of custody, I undertake that he shall pay the debt due to you by four half-yearly instalments," etc. The defendant subsequently became bankrupt and obtained his certificate. Lord *Denman*, C.J., said: "*Bacon* was at this time in custody under a *ca. sa.* for the debt in question; and, as that was entirely discharged by the execution, and he could no longer be sued for it, or make default in respect of it, it was argued, on the authority of *Goodman v. Chase* (c), that this undertaking was an original one, on the part of the bankrupt, to pay the amount of the sum that had been due from *Bacon*, and though in form it was an undertaking that *Bacon* should pay, yet at most it was an undertaking by the defendant to pay by the hand of *Bacon*. On consideration we agree that this is correct; the unpaid instalments might, therefore, have been estimated and proved under the commission. It follows that his certificate is a bar to the action."

Maggs v.
Ames.

In *Maggs v. Ames* (d) the first count of the declaration stated that *Ann Prickett*, a married woman, was indebted to the *Howells* before they became

(a) 11 M. & W. 857. (b) 1 Q. B. 933. (c) 1 B. & Ald. 297.
 (d) 4 Bing. 470; 1 M. & P. 294. See *ante*, note (d), p. 100.

bankrupts, and was arrested at their suit; that, thereupon, in consideration that the *Howells* (before their bankruptcy) would procure the discharge of *Ann Prickett*, and take her bill of exchange for the amount of the debt, the defendant undertook to pay the amount of the bill of exchange, in case it should be dishonoured by *Ann Prickett*. The *second count* was upon an undertaking to pay the debt for which *Ann Prickett* was arrested, in consideration of the *Howells* procuring her discharge. It was held, that the undertaking stated in the first count was within the Statute of Frauds, but that that stated in the second count was not. It will be observed, that the reason the undertaking stated in the second count could not be within the 4th section of the Statute of Frauds is, because the consideration for it was the discharge from arrest of the principal debtor, and her consequent release from all liability.

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Ante, p. 66.
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On the same principle, when there is a complete *novation*, that is to say, an arrangement, by which it is provided that an old debt shall be discharged, and an entirely new agreement and liability entered into, the Statute of Frauds does not apply. Thus, in *Ex parte Lane (e)*, it was decided that if A. be a creditor of B., and B. and C. purpose to enter into, or have entered into partnership, and say to A., "We wish this debt to be a debt from us both, and we will pay it," and A. accedes to that, although there is no writing, the agreement is valid and effectual, and is not in any way affected by the Statute of Frauds. The effect of such an agreement is to *extinguish* the first debt, and, for a valuable consideration, to substitute the second debt.

Where there is a complete *novation* the statute does not apply.

So, again, in *Anstey v. Marden (f)*, A. being insolvent,

Anstey v. Marden.

(e) 1 De Gex, 300.

(f) 1 B. & P. N. R. 124. See this case *post*, p. 157. In the case of *Emmet v. Dewhurst*, 3 Mac. & G. 587, which is very similar to *Anstey v. Marden*, it did not appear that the liability of the principal debtor was extinguished, and the Statute of Frauds was held to apply.

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Aut., p. 66.

a verbal agreement was entered into between several of his creditors and B., whereby B. agreed to pay the creditors 10s. in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to B. It was held that this agreement was not within the Statute of Frauds, not being a collateral promise to pay the debt of another, but an original promise to purchase the debts.

Where A. sold goods to B., who, being unable to pay for them, made a transfer thereof to C., who promised A. to pay for them, it was held that this constituted a new sale to C., and not a mere promise by C. to pay the debt due from B. (a)

The novation of a debt operates as a complete release of the original debtor, and cannot be construed as a mere covenant not to sue him (b). Thus, where a creditor released his principal debtor and accepted a third person as full debtor in his stead, and the surety for the former debtor agreed to give a guarantee for the latter, and to continue his former guarantee until he did so, and then died, without having given it, it was held, in an action by the creditor against his executors, that, the former debt having been extinguished by the release, the remedy against the deceased was gone (c).

Transfer to
 creditor of
 debt due to
 debtor from
 third person
 not within
 statute.

There is another class of cases turning upon the same principle. These cases, which are of frequent occurrence, are cases in which a person to whom another is indebted assigns or transfers the debt owing to him to a person to whom he is himself indebted (d).

(a) *Browning v. Stallard*, 5 Taunt. 450.

(b) *Commercial Bank of Tasmania v. Jones* (1893), A. C. 313; 68 L. T. 776.

(c) *Ib.*

(d) See *Israel v. Douglas*, 1 H. Bl. 239; *Tatlock v. Harris*, 3 T. R. 174; *Hodgson v. Anderson*, 5 D. & R. 735; *S. C.*, 3 B. & C. 842; *Wilson v. Coupland*, 5 B. & A. 228; *Cuxon v. Chadley*, 3 B. & C. 591;

Thus, suppose A. is debtor to B., and C. is debtor to A. for the same or a larger amount, and that the three agree that C. shall be B.'s debtor instead of A., and that C. promises to pay B., in such a case B. may maintain an action against C. (*e*). These cases are exceptions to the rule of law that a chose in action cannot be assigned (*f*). It is a necessary ingredient to this exception that the original debt from A. to B. should be extinguished, for B. cannot sue C. if he retains the right to sue A. (*g*). To such cases, therefore, the 4th section of the Statute of Frauds can have no application, since it is essential to the *validity* of the transaction that the transferor's liability be *extinguished*. In such a case, the substituted debtor, in fact, pays *his own debt with his own money*, to a substituted creditor, *i.e.*, the transferee (*h*). Thus, in *Lacy v. M'Neile* (*i*), *Lacy v M'Neile*. one *Goodfellow*, indebted to the plaintiffs for goods sold, upon being released from his liability, assigned to them a debt due to him from the defendants. Notice of the assignment was given to a partner in the defendant's firm, who, *by parol*, promised, in the name of such firm, to pay the debt to the plaintiffs out of the partnership funds. It was held, in an action by the plaintiffs against the defendants for money had and received, that the promise was not within the Statute of Frauds.

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Wharton v. Walker, 6 D. & R. 288; 4 B. & C. 163; *Fairlie v. Denton*, 2 M. & R. 353, and note (*c*), 355; *S. C.*, 8 B. & C. 395; *Roe v. Haugh*, 3 Salk. 14.

(*e*) *Wilson v. Coupland*, 5 B. & A. 228; *Fairlie v. Denton*, 2 M. & R. 353, and note (*c*), 355; *S. C.*, 8 B. & C. 395.

(*f*) But see now Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, ss. (6), rendering debts and choses in action assignable in law.

(*g*) 1 Wm. Saund. p. 226, and the following cases there cited, viz., *Cuxon v. Chadley*, 3 B. & C. 591; *Wharton v. Walker*, 6 D. & R. 288; *S. C.*, 4 B. & C. 163. (See also *Parker v. Wise*, 6 M. & S. 239; *Liversidge v. Broadbent*, 4 H. & N. 603.)

(*h*) See also *post*, p. 139 *et seq.*

(*i*) 4 D. & R. 7, 9.

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Abbott, C.J., in the course of the argument, said: "The defendant's debt to *Goodfellow* was assigned to the plaintiffs, and *Goodfellow* discharged from all liability to them; then, surely, the old debt by him was extinguished, and a new one by the defendants created."

Wilson v.
Coupland.

Wilson v. Coupland (a) is another instance of this kind. There the plaintiffs were creditors, and the defendants debtors of T. & Co., and by consent of all parties an arrangement was made that the defendants should pay to the plaintiffs the debt due from them to T. & Co. *The Statute of Frauds does not seem to have been alluded to in the case*, and it was held that, as the demand of T. & Co. on the defendants was for money had and received, the plaintiffs were entitled to recover on a count for money had and received against the defendants. Now, in this case, it will be observed that the debt transferred actually *existed*. In the case of

Parkins v.
Moravia.

Parkins v. Moravia (b), on the other hand, the transfer was not of an *existing* debt, but of a *contingent* one. There the defendant, in consideration that the plaintiffs would discount a bill of exchange for a person named *Benjamin*, undertook to pay the plaintiffs such sum of money as should be due from him to *Benjamin* for work done within a specified time. It was contended that the case was within the Statute of Frauds. *Abbott*, C.J., said, "It is an assignment of a thing not *in esse*. *Wilson v. Coupland* is not like this case." He also said, in answer to plaintiff's counsel, "It is to go to reduce the bill, and, therefore, it is to answer for the debt of another." It appears, from the report of this case, that another question was also raised as to the amount of stamp duty required, and a verdict was taken for the plaintiff, subject to the two points of law, in order that the opinion of the court above might be had on them, or a motion to enter a nonsuit. This motion

(a) 5 B. & Ald. 228.

(b) 1 C. & P. 376.

never appears to have been made, and no further report of this case appears anywhere. Much importance cannot, therefore, be attached to it. Indeed, between this case and *Wilson v. Coupland* there seems to be no rational distinction (c).

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Again, in *Hodgson v. Anderson* (d), where the defendant, who owed A. B., a debtor of the plaintiff, a sum of money, at A. B.'s request promised the plaintiff to pay him what he (the defendant) owed A. B., such promise was held not to be within the 4th section of the Statute of Frauds, for A. B.'s debt was extinguished by the defendant's promise. The case of *Browning v. Stallard* (e) involves the same principle. There A. sold goods to B., who, being unable to pay for them, transferred them to C., who promised A. to pay for them. It was held, that the promise was not within the 4th section of the Statute of Frauds, as B. was discharged from all liability.

Hodgson v. Anderson.

Browning v. Stallard.

The cases which have now been cited abundantly illustrate the proposition that, to bring a case within the Statute of Frauds, there must be a *liability, present or future*, existing on the part of some person other than the promiser. It will not have been forgotten, however, that the rule we have laid down states, in the alternative, that there must *either* be some other person actually liable in the first instance, *or* that the creation of such liability at a future time must be contemplated. Hitherto we have only considered the absolute necessity which the rule creates, that there should be some actual liability by a third person. It now becomes necessary to discuss the question suggested by the terms of Rule 1, and to consider when, in point of time, a liability may take its origin, and yet be such as to bring a case within the Statute of Frauds.

(c) Smith's Merc. Law, 10th ed., p. 571, n (x).

(d) 5 D. & R. 735; S. C., 3 B. & C. 842.

(e) 5 Taunt. 450.

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Formerly, if
 promise made
 by surety
before
 creation of
 third party's
 liability,
 statute did
 not apply.

Now, formerly, it was necessary that, *at the time* of the making of the promise, some one should be *actually liable*, in the first instance, to the promisee, and a contract did not fall within s. 4, if, at the time of the making of the promise, the creation of such liability at some future period was only *contemplated* and not *actually in existence*. If, therefore, the promise were made *before* creation of liability on the part of a third party for a debt, default, or miscarriage, it was deemed an original undertaking, and, therefore, not within the Statute of Frauds. This enactment was held to apply only to promises made *after* the debt, default, or miscarriage of a third party.

Mowbray v.
Cunningham.

This distinction, which now no longer exists, was first taken in the case of *Mowbray v. Cunningham (a)*. There goods were delivered to A., at the request of B., who said *he would see them paid for*. Lord Mansfield held, that, as the promise was *before* delivery of the goods, it was not within the Statute of Frauds, because at the time the promise was made there was no debt at all. In *Jones v. Cooper (b)*, Lord Mansfield, though at first inclined to follow the case just cited, ultimately decided, *on the facts of the case before him*, that there was a collateral promise within the Statute of Frauds. It is right to mention, however, that there could be no doubt that the promise in *Jones v. Cooper* was within the statute, for it was in these words: "I will pay you if *Smith* does not;" while in *Mowbray v. Cunningham* the words were: "If you supply goods to A. I will see you paid," and the latter expression is clearly open to a double construction.

Peckham v.
Faria.

The next case which throws light upon the subject under discussion is *Peckham v. Faria (c)*, where

(a) *Sittings after Hil. T. 1773*, at Guildhall, cited by BULLER, J., in *Matson v. Wharam*, 2 T. R. at p. 8, and by Lord MANSFIELD in *Jones v. Cooper*, Cowp. 227.

(b) Cowp. 227.

(c) 3 Dougl. 13.

Jones v. Cooper was commented on. The facts are briefly as follows: The defendant, and one *Sylva*, came to the plaintiff's warehouse and agreed on a parcel of goods for *Sylva*, and the plaintiff asked if the defendant would answer for him; the defendant said that he would guarantee the payment. *Sylva* came on another occasion by himself and ordered other goods, when the plaintiff sent to the defendant and asked him whether he would engage for *Sylva*. The defendant said, "You may not only ship that parcel, but one, two, or three thousand pounds more, and I will pay you if he does not." This promise was made before the delivery of the goods to *Sylva*. The goods were subsequently delivered to *Sylva*. In giving judgment, Lord Mansfield said: "Before the case of *Jones v. Cooper*, I thought there was a solid distinction between an undertaking after credit given and an original undertaking to pay; and that, in the latter case, the surety, being the object of the confidence, was not within the statute; but in *Jones v. Cooper*, the court was of opinion that, wherever a man is to be called upon only in the second instance, he is within the statute; otherwise, where he is to be called upon in the first instance. Here, by the words of the promise, *Sylva* was to be called on first, the defendant undertaking to pay if *Sylva* did not pay. The case is not distinguishable from *Jones v. Cooper*, and the words of the statute are very strong." The distinction that was drawn in *Mowbray v. Cunningham* was finally abrogated in *Matson v. Wharam* (d). There the defendant asked the plaintiff whether he was willing to serve one R. C. with groceries; and, upon the plaintiff answering that he did not know him, the defendant replied, "If you do not know him you know me, and I will see you paid." On the faith of this promise goods were sent to R. C.'s order, and R. C.

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Abrogation
of distinction
drawn in
Mowbray v.
Cunningham.

RULE I.
Ante, p. 66.

was debited for the amount in the plaintiff's books. R. C. making default by not paying for the goods, the plaintiff sued the defendant, and a verdict was given for the plaintiff, subject to the opinion of the court upon the case as stated. On the argument, *Jones v. Cooper* and *Mowbray v. Cunningham* were cited by the plaintiff's counsel to show that there was a recognized distinction between a promise for the payment of goods for another person *before* delivery and *after*. The court, however, was clearly of opinion that that distinction had been overruled, though it may be observed that in the judgment no cases to this effect were cited (*a*). It will be noticed, however, from the judgment of *Buller, J.*, that he regrets that the authorities do not *allow him* to decide in accordance with *Mowbray v. Cunningham*. He says: "If this were a new question, the leaning of my mind would be the other way; for Lord Mansfield's reasoning in the case of *Mowbray v. Cunningham* struck me very forcibly. But the authorities are not now to be shaken; and the general line now taken is, that if the person for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the Statute of Frauds, 29 Car. 2, c. 3, s. 4."

Where
 promise
 precedes
 third party's
 liability
 sometimes
 difficult to
 determine to
 whom credit
 given.

Mountstephen
v. Lukeman.

In many cases, and particularly where, as in *Birkmyr v. Darnell* (*b*), the promise *precedes* the liability of the third person, it often becomes extremely difficult to determine whether it is intended by the parties that the third person should be primarily liable. In these cases the nature of the contract depends on the answer given by the jury to the question, "*To whom was credit given?*" The well-known case of *Mountstephen v.*

(*a*) But see *Peckham v. Faria*, *ante*, and *Parsons v. Walter*, cited in note (*c*), 3 Dougl. 14.

(*b*) 1 Salk. 27; 2 Ld. Raym. 1085; 1 Sm. L. C., 10th ed., p. 287.

Lakeman (c), part of the judgment in which has been previously cited (d), furnishes an apt illustration of what has just been stated. It is proposed, therefore, to give a somewhat lengthy report of this case. The following facts were proved at the trial, which took place before *Kelly*, C.B., at the Devon Summer Assizes, 1870:—The plaintiff had been employed to construct a main sewer by a local board of health, of which the defendant was the chairman. Notice having been given by the board to the owners of certain houses to connect their house drains with the main sewer within twenty-one days, the surveyor of the said board, before the expiration of that period, proposed to the plaintiff that he should construct the connections between the house drains and the main sewer. This the plaintiff said he was willing to do if the board would see him paid; and the plaintiff accordingly commenced the construction of the connections before the expiration of the twenty-one days. The plaintiff stated, in evidence, that the day on which the construction of the connections was commenced, and an hour previous to the commencement, he was leaving with his carts and men, when the surveyor of the board stopped him and requested him not to go away, as there was more work to be done. The plaintiff asked who was to be responsible for the payment, and the surveyor answered that the defendant was waiting to see the plaintiff about it. The plaintiff then had an interview with the defendant, at which the following conversation took place. The defendant said, “What objection have you to making the connections?” The plaintiff said, “I have none if *you* or the *board* will order the work or become responsible for the payment.” The defendant replied, “Go on, *Mountstephen*, and do

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Ante, p. 66.

(c) L. R. 5 Q. B. 613; *S. C.*, L. R. 7 Q. B. 197; *S. C.*, 7 H. L. 17.

(d) *Ante*, p. 69, 70.

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Ante, p. 66.

the work, and I will see you paid." The plaintiff accordingly did the work under the superintendence of the surveyor of the board; and on December 5th, 1886, sent in the account to the board, debiting them with the amount. The board refused payment, alleging that they had never themselves agreed with the plaintiff, or authorized any officer of the board to agree with him for the performance of the work in question. The plaintiff, for the first time, on November 20th, 1869, applied to the defendant for payment of the work, and (the defendant having refused to pay him) commenced the action.

The first count of the declaration alleged that, in consideration the plaintiff would do certain work for the board at the request of the defendant, as and assuming to be agent of the board, the defendant promised the plaintiff that he was authorized by the board to make such request. That the plaintiff did the work, but that the defendant turned out not to be authorized, and the plaintiff was unable to make the board pay. There was a second count, alleging the defendant's promise to be that he would procure a contract from the board, whereby they should be bound to pay for the work. The third count was the common money count for work, labour, etc.

At the trial a further count was added, alleging the defendant's promise to be, that in consideration that the plaintiff would do the work for the board, the defendant promised to pay for the work, if the board should at any time refuse to pay.

The pleas were as follows:—To the money counts: Never indebted. And, to the other counts—

1. That the defendant did not promise as alleged.
2. That the plaintiff did not do the work at the defendant's request, as alleged. At the close of the plaintiff's case, the defendant claimed a nonsuit, on the

ground that there was no evidence of any liability on the part of the defendant.

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Ante, p. 66.

The judge declined to nonsuit, stating his opinion that there was evidence to support a count in the form above given, and which he gave the plaintiff leave to add. The defendant's case was then entered into, and the defendant denied that any conversation of the kind deposed to by the plaintiff had ever taken place. The judge left it to the jury to say whether the conversation did take place, and the jury returned a verdict for the plaintiff for the amount claimed. Leave was reserved to the defendant to move to enter a nonsuit, if it should appear that either upon the original declaration, or upon the declaration as amended, there was no evidence which ought to have been left to the jury. The defendant obtained a rule to enter a nonsuit accordingly, on the ground that there was no evidence of original liability on the part of the defendant to the plaintiff for the work to be done; or, for a new trial, on the ground that the verdict was against the evidence. The Court of Queen's Bench afterwards made the rule absolute to enter a nonsuit, on the ground that the defendant's promise was an undertaking to be answerable for the debt of another, within s. 4 of the Statute of Frauds, and not being in writing was void. The Court of Exchequer Chamber, however, reversed the judgment of the Queen's Bench, on the ground that there was evidence on which the jury might have found that the defendant agreed to be primarily liable. It will be observed that in this case the real question was, what did the plaintiff and the defendant understand to be the effect of the conversation which passed between them? Did the defendant mean to make himself liable to the plaintiff whether the board became so or not, or did he mean to make himself liable only in the event of the board becoming liable, and then only in the *second* instance, and in which of these senses did

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Ante, p. 66.

the plaintiff understand the promise, or, in other words, *To whom did he give credit?* Willes, J., in his judgment in the Exchequer Chamber, thus defines the nature of the contract entered into between the parties in this case: "It is," he says, "a bargain, therefore, by the defendant to pay for the work, though it was known that there was no person liable at the time, and whether a third person should become liable in future or not, that is, whether or not there was or might be a third person who could be *liable* for a debt, or *guilty* of a default or miscarriage in the matter. And it is only in respect of such a third person that the Statute of Frauds applies." In the same judgment we also find the following passage:—"In this case, seeing that the parties knew that the board was not liable, and that the plaintiff would not go on unless he had the board or the defendant liable, and did not care to have the defendant liable if the board was liable, the facts seem to exclude, and the jury might well find that they excluded, the notion of the defendant becoming surety for a liability, either past, present, or future, upon the part of the board; and they might look upon the defendant's contract as a contract to pay, whether the board have been, are, or shall be liable or not. Do that work now, and you shall be paid for that work. So that it is a case of principal liability." There are also many other cases to be found in the reports, in which, just as in *Mountstephen v. Lakeman*, it has been held that the evidence showed a state of facts from which it might be inferred that the liability of the defendant was an original and primary liability. Thus, in *Smith v. Rudhall* (a), the defendant employed a builder to erect some houses, and gave a guarantee for a supply of materials to the builder to a certain amount. Afterwards, the defendant gave an *order* for a future supply to a certain amount: more materials were,

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Rudhall.

accordingly, supplied on the order of the builder, and at the trial it was proved that the defendant himself was constantly on the premises. Under these circumstances, it was held that it was for the jury to say whether the defendant had so acted as to lead the plaintiff to believe that the latter supply was to be on his credit.

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Ante, p. 66.

A somewhat similar case is that of *Edge v. Frost* (b). *Edge v. Frost.* There the defendant undertook in writing that, if the plaintiff would put up a certain gas apparatus in a theatre for one *John Brunton*, he (the defendant) would see the plaintiff paid for the said gas apparatus. It appeared, however, at the trial, that the defendant had himself given orders about the work *before* and *after* the guarantee was given. *Abbott*, C.J., left it to the jury to determine whether the defendant, though he had no interest in the theatre at the period in question, was not one of the persons who had originally given orders for the gas apparatus, for, if he was, a verdict might be recovered upon his own personal liability, without regard to the guarantee (c).

So in *Scholes and Another v. Hampson and Merriott* (d), *Scholes v. Hampson.* the defendant *Hampson* having asked the plaintiffs to sell him a quantity of goods upon credit, and the plaintiffs having refused to let him have them, unless some one would be *answerable for the payment*, he afterwards brought with him the other defendant, who was a near relation of his, but not at all connected with him in business, all of which facts were well known to the plaintiffs. The defendant *Merriott* then requested the plaintiffs to let *Hampson* have what cotton he might

(b) 4 D. & R. 243.

(c) In this case the jury found their verdict for the plaintiff for the sum demanded, on the common counts for work and labour, and materials found, on the ground that the defendant was one of the persons who originally gave the order for the work.

(d) Cited in *Fell on Guarantees*, 2nd ed., p. 27.

RULE I.
A. 10, p. 66.

want; and agreed verbally, that the credit should be given to them jointly, and the invoices made out in their joint names. Several parcels of cotton were accordingly delivered by the plaintiffs to *Hampson*, who from time to time made payments for the same. But, becoming insolvent, this action was brought against him and *Merriott* for the balance. *Hampson* had let judgment go by default, and the question was as to the liability of *Merriott*. It was objected, on his behalf, that upon these facts *Merriott* could not be considered a partner, but was only surety for *Hampson's* payments, and that, therefore, his undertaking was for the debt of another, and void by the Statute of Frauds as not being in writing. And it was contended that the permitting such *parol* promises to avail would be virtually to repeal the statute. But *Chambre, J.*, overruled the objection, not thinking this to be a case within the statute, and the case was never afterwards questioned.

Simpson v.
Penton.

The same principles were acted upon in *Simpson v. Penton* (a). There the plaintiff introduced the defendant to one *Overston*, an upholsterer, and in his presence asked *Overston* if he had any objection to supply the defendant with some furniture, and that if he would do so, he (the plaintiff) "would be answerable." The upholsterer, having asked the plaintiff how long credit he wanted, plaintiff replied, "he would see it paid at the end of six months." *Overston* having agreed to give this credit, the plaintiff gave him the order, and the goods were accordingly supplied. At the end of six months the defendant not having paid the amount, the upholsterer applied to the plaintiff for payment, and he paid the money. The entry in *Overston's* book was "Mr. *Penton* (b) per Mr. *Simpson*" (c). It was held, that this was an original and not a collateral undertaking, on the

(a) 2 C. & M. 430. See also *Dixon v. Hatfield*, 2 Bing. 439.

(b) *I.e.*, the defendant in the above case.

(c) *I.e.*, the plaintiff in the above case.

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Ante, p. 66.

ground that credit was clearly given entirely to the defendant, and that the jury were warranted in so finding. In this case, *Bayley*, B., said: "I think that the expressions 'I'll be answerable,' and 'I'll see you paid,' are equivocal expressions. And then we ought to look to the circumstances to see what the contract between the parties was. I do not say that without authority; for there was a case (*d*) which I believe will be found in the 2nd Volume of *Douglas* (*e*), in which the Court of King's Bench said that a contract might be collateral or not, according to circumstances, and that it depends on the circumstances whether it is collateral or not. It was the case of *Oldham v. Allen*, and was decided in Michaelmas Term, in the 24th of Geo. 3: there the defendant had sent for a farrier to attend some horses, and said to the farrier, 'I will see you paid.' The plaintiffs knew the parties who were owners of some of the horses, and made them debtors, but debited the defendant for the others, whose owners he did not know; the court held, that the promise was original in respect of those owners whose names he did not know; but, in respect of the others whom he did know, that it was collateral. In that case there was a construction on the very same words, making the promise either original or collateral, according to the circumstances. Here it is quite clear that the goods were furnished for *Penton's* benefit; but it does not appear that he said one word by which he pledged himself, so as to give *Overston* a right to call upon him. *Simpson* was asked what time he wanted to pay. He says, 'I'll see it paid in six months.' It was left to the jury to say whether he was the original debtor, and they found that he was. I think the jury were warranted in that finding. My opinion is founded substantially on

(*d*) See, however, *Gordon v. Martin*, *post*, p. 118, which is perhaps the earliest authority on this point.

(*e*) *Semble*, not reported anywhere.

RULE I.
Id., p. 66.

the facts of the case, and not on the equivocal expressions, as I consider the words capable of being explained by other circumstances. I am satisfied that, though *Overston* was willing to see if *Penton* would pay, he never had a legal claim upon him but upon *Simpson* only" (a).

Gordon v.
Martin.

Perhaps, however, one of the earliest authorities for the principles just laid down is the case of *Gordon v. Martin* (b). There the promise was as follows: "If L. S. shall go through the purchase (the defendant's brother having been then in treaty with the said L. S. for the sale of an estate), my brother will give you a handsome gratuity for the trouble and pains you shall be at in transacting the affair, which I promise and assure you shall not be less than 300*l*. My meaning is, you shall be paid when the conveyances shall be executed." The whole court held, that though the promise was that the defendant's brother should pay the gratuity, yet it bound the defendant as much as if he had promised for himself; for the work and labour was at his request, and upon his credit. And Mr. Justice *Lee* said that there was a difference between a conditional and an absolute undertaking, as if A. promise to pay B. such a sum if C. does not, there A. is but a security for C. But if A. promise that C. will pay such a sum, A is the principal debtor; for the act done was on his credit, and no way upon C. The

(a) In the following cases the words "I'll see you paid," or words almost identical with these, were made use of by the promiser. See *Birkmyr v. Darnell*, Salk. 27; 2 Lord Raym. 1085; 1 Sm. L. C. 10th ed., p. 287; *Matson v. Wharam*, 2 T. R. 80; *Bateman v. Phillips*, 15 East, 272; *Mountstephen v. Lakeman*, 7 H. L. 17; L. R. 7 Q. B. 197; S. C., 5 Q. B. 613; *Clancy v. Piggott*, 4 Nev. & Mann. 496; *Watkins v. Perkins*, 1 Lord Raym. 224; *Mowbray v. Cunningham*, cited by BULLER, J., 2 T. R. 80; *Simpson v. Penton*, 2 C. & M. 430; *Keate v. Temple*, 1 B. & Pull. 158. See also observations of HOLT, J., in *Austen v. Baker*, 12 Mod. 250.

(b) Fitzg. 302.

Statute of Frauds was not, it seems, directly referred to in this case.

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Ante, p. 66.

On the other hand, there are several cases in which the attempt to render the defendant liable, as on a primary and original agreement, has failed. And the courts have held, that, *upon the facts of the case*, the liability was clearly only collateral, and there was no evidence from which a primary liability could possibly be inferred. A leading instance of this kind is the case of *Keate v. Temple* (c). There the defendant, a first lieutenant in the Navy, serving on board her Majesty's ship *Boyne*, requested the plaintiff, a tailor and slopseller, to supply the crew of the *Boyne* with clothing, at the same time making use of the following words:—"I will see you paid at the pay-table: are you satisfied?" the plaintiff answered, "*Perfectly so.*" It appeared in the evidence that the clothes were delivered on the quarter-deck of the *Boyne*; that slops were usually sold on the main deck; that defendant produced samples to ascertain whether his directions had been followed; that some of the men, who said they did not want clothes at all, were compelled by the defendant to take them; while others, who did not want a complete suit, were compelled against their will to take what they did not want. It also appeared that some time after the delivery the *Boyne* was burnt, and the crew dispersed into different ships. The plaintiff then expressed some apprehensions for himself and was told by the defendant, "Captain *Grey* (captain of the *Boyne*) and I will see you paid: you need not make yourself uneasy."

Cases in which facts rebut existence of primary liability and promiser is a mere surety.

Keate v. Temple.

Lawrence, J., who tried the action (which was *assumpsit* for goods sold and delivered, work and labour and common money counts), left it to the jury to say if they were satisfied on the evidence that the goods in

PRINCE L.
Atk., p. 66.

question were advanced on the credit of the defendant as immediately responsible, in which case the plaintiff would be entitled to a verdict; or if they believed that at the time the goods were furnished the plaintiff relied on being able, through the assistance of the defendant, to get his money from the crew, then they ought to find for the defendant. The jury found a verdict for the plaintiff. A rule *nisi* was then obtained for a new trial, on the ground that the defendant's undertaking was within the Statute of Frauds, s. 4. This rule was made absolute, but only on the ground that the verdict was against the weight of the evidence. The court considered that, upon the facts, the weight of the evidence went to show that credit was originally given to the crew, and not to the defendant, whose very position tended to negative the supposition that he had made himself answerable, *in the first instance*, for so large a sum as the amount of plaintiff's claim.

Rains v.
Story.

A similar conclusion was arrived at in the case of *Rains v. Story* (a). There A. applied to B. for goods; B. asked for a reference; A. referred him to C. C., on being applied to, inquired the amount of the order, and on what terms the goods were to be furnished, and, on being told, said, "You may send them, and *I'll take care that they are paid for at the time.*" He was afterwards written to, to accept a bill for the amount, to which he replied that he was not in the habit of accepting bills, *but that the money would be paid when due.* After this B., the seller, wrote to C. about the goods, and spoke of them in his letter as goods which C. had "*guaranteed,*" and the attorney of B.'s assignees (when B. had become bankrupt) wrote to A. for the money, and threatened process; but this letter was a circular, written in pursuance of a list made out for him by B., and without any knowledge of the circumstances under

which the debt was contracted. It was held, that on this evidence C. was not primarily liable, but only as a guarantor of the debt of A. RULE I.
Ante, p. 66.

To a like effect is the case of *Anderson v. Hayman* (b). *Anderson v. Hayman.* There the plaintiff's traveller, at the request of the defendant, wrote to the plaintiff, requesting him to supply the defendant's son with goods, stating that the defendant would be answerable for the payment of the money due for the goods, as far as 800*l.* or 1,000*l.* went. The defendant's son was debited in the plaintiff's books, and, being applied to for payment, wrote to say that he had expected a twelve month's credit, and added: "I shall at this rate make you remittance for the different parcels as they come due." The son failed, and the defendant was accordingly sued for the value of the goods. The declaration contained seven counts, which were as follows:—The first was on an agreement by the defendant to pay, etc., in consideration that the plaintiff would sell the goods to his son; the second was on a *quantum meruit*; the third was for goods sold and delivered to the son at the request of the defendant; the fourth was on a *quantum meruit*; the fifth was for money paid to the use of the defendant; the sixth was for goods sold and delivered to the son on a promise by the defendant to see the plaintiff paid to the amount of 800*l.*; the seventh was the same promise on a *quantum meruit*. The defendant *pleaded* the general issue. *Heath*, J., who tried the cause, directed the jury whether the plaintiff gave credit to the defendant *alone*, or to him *together with his son*, telling them that in the former case they would find a verdict for the plaintiff; in the latter for the defendant, being of opinion that, if any credit was given to the son, the promise of the defendant, not being in writing, was void by the Statute of Frauds. A verdict was found

RULE I.
Ante, p. 66.

for the defendant. A rule was obtained to show cause why this verdict should not be set aside and a new trial granted. Ultimately this rule was discharged, as the court was clearly of opinion that this promise, not being in writing, was void by the Statute of Frauds, as it appeared from the evidence that credit was given to the defendant's son as well as to the defendant.

Entry in
 plaintiff's
 books
 sometimes
 indicates to
 whom credit
 was given.

The manner in which the transaction is entered in the plaintiff's books often has a great effect in determining to whom credit was originally given, and so in determining whether defendant's liability is original or not.

Austen v.
Baker.

Thus, in *Austen v. Baker* (a), which was decided about the year 1796, we read that *assumpsit* having been brought against *Baker*, upon a promise supposed to be made by him to pay for goods delivered by the plaintiff to A., *Holt*, C.J., took this difference: "If B. desire A. to deliver goods to C., and promise to see him paid, there *assumpsit* lies against B., though, in that case he said at *Guildhall*, he always required the tradesman to produce his books, to see whom credit was given to. But if, after goods delivered to C. by A., B. says to A., 'You shall be paid for the goods,' it will be hard to saddle him with the debt."

Storr v. Scott.

So, also, in the more modern case of *Storr v. Scott* (b), it was held that, when a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it be shown by *unequivocal* evidence that the credit was, in fact, given to another.

Sometimes,
 though credit
 entirely given
 to promiser,
 Statute of
 Frauds
 applies.

Moreover, the question "To whom was credit given?" is not an infallible test by which to discover, in all cases, whether or not the promise falls within the 4th section of the Statute of Frauds. For sometimes it happens that credit is entirely given to the promiser, and yet the

(a) 12 Mod. 250.

(b) 6 C. & P. 241.

promise is within the 4th section of the Statute of Frauds. This is the case whenever the promise *has not the effect of discharging the original debtor*. Thus, in *Barber v. Fox* (c), where A. promised an attorney that, if he would *continue* to act for B. in certain legal proceedings, he would pay him whatever was to be paid, it was held that the 4th section of the Statute of Frauds applied. Lord *Ellenborough*, in giving judgment, said: "This was the inchoate business and debt of another, and if the defendant had promised in writing, he would have made himself liable; without a promise in writing, he is not liable."

RULE I.
Ante, p. 66.

Barber v. Fox.

RULE II.—*The promise must be made to the creditor, i.e., to the person to whom another is already, or is thereafter, to become liable, and semble who can bring an action to enforce such liability.* (d)

RULE II.

The promise must be made to the creditor.

It is now quite clear that a promise to answer for the debt, default or miscarriages of another person, to come within the 4th section of the Statute of Frauds, must be made to the person to whom another is already, or is thereafter, to become liable (e). This was first decided in *Eastwood v. Kenyon* (f). There, the plaintiff was liable to a Mr. *Blackburn* on a promissory note, and the defendant, for a valid consideration, promised the plaintiff to pay and discharge the note to *Blackburn*. It was held that, as the promise was made to the debtor, and not to the creditor, the statute did not apply. Lord *Denman*, C.J., in the course of his judgment in this case, said: "If the promise had been made to *Blackburn*, doubtless the statute would have applied; it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant

Eastwood v. Kenyon.

(c) 1 Stark. 270.

(d) Per BOWEN, L.J., in *In re Hoyle, Hoyle v. Hoyle*, (1893) 1 Ch. at p. 99. See *post* p. 129—130.

(e) Per PARKE, B., *Hargreaves v. Parsons*, 13 M. & W. 561.

(f) 11 A. & E. 438; 3 P. & D. 276; 4 Jur. 1081.

RULE II.
Ante, p. 123.

is, that it is not less the debt of another because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. *But, upon consideration, we are of opinion that the statute applies only to promises made to the person to whom another is answerable" (a).*

*Reader v.
 Kingham.*

So, also, in the case of *Reader v. Kingham* (b), it appeared that one *Malins* had recovered a judgment in the county court against one *Hitchcock* for 34*l.*, debt and costs. A warrant had been obtained for the committal of *Hitchcock* to goal for thirty days, and placed in the hands of the plaintiff, *Reader*, who was bailiff of the county court. Though the debt and costs exceeded 34*l.*, the bailiff appears to have been instructed by *Malins* to accept 17*l.* in satisfaction. The bailiff being about to arrest *Hitchcock*, *Kingham* verbally promised him that, if he would abstain from executing the warrant, he (*Kingham*) would, on the following Saturday, either pay the 17*l.* or surrender *Hitchcock*. The money not having been paid, and *Hitchcock* not having been surrendered, the bailiff brought an action to recover the 17*l.* On the argument, it was conceded that the arrest and imprisonment of *Hitchcock*, under the warrant, would not have operated to discharge the debt; but it was held, that, inasmuch as the debt was due to *Malins* from *Hitchcock*, and as the promise was made to *Reader* (the bailiff), the Statute of Frauds did not apply to the case, and that, therefore, the defendant was liable on his promise to the plaintiff, though it was not in writing. The decision in *Reader v. Kingham* was followed in the recent case of *Wildes v. Dudlow* (c). There A., at the request of and on a verbal

*Wildes v.
 Dudlow.*

(a) *Gregory v. Williams*, 3 Meriv. 582, is also an instance of a promise made to a debtor to pay his debt to a third party, though it was decided on other grounds.

(b) 13 C. B. (N.S.) 344.

(c) L. R. 19 Eq. 198. As already stated, *ante*, p. 50, this case was approved of and followed by the Court of Appeal in *Guild & Co. v.*

offer by B. to indemnify him against loss, joined with C. in a joint and several promissory note which he was afterwards compelled to pay. It was held, that the offer to indemnify A. was not an agreement within the statute, and therefore need not be in writing, and that A., having afterwards become the executor of B., was entitled to retain the amount paid by him on the note as a debt due to him from B.'s estate. Another instance of the same doctrine is afforded by the case of *Hargreaves v. Parsons* (d). In that case the defendant and one *Parker* agreed for the sale by *Parker* to the defendant of the "put or call" of fifty foreign railway shares at a certain price per share premium at any time on or before the 18th February, 1844. Before that day the defendant agreed to re-sell the option to the plaintiff and to guarantee the performance of the agreement by *Parker*. On the 16th February the plaintiff "called" the shares, but it was at the same time verbally agreed between him and the defendant and *Parker* that they should be delivered by *Parker* to the plaintiff not on the 18th February, but on the 2nd March, at Paris. It was held, that this was not an agreement by the defendant to be answerable for the default of *Parker*. *Parke, B.*, in his judgment, says: "*The statute applies only to promises made to the persons to whom another is already or is to become answerable.* It must be a promise to be answerable for a debt of or a default in some duty by that other person towards the promisee. This was decided, and no doubt rightly, by the Court of Queen's Bench, in *Eastwood v. Kenyon* (e) and in *Thomas v. Cook* (f). In this case *Parker* had not contracted with the plaintiff, nor was it intended that he should; there was no privity between them; the non-performance of *Parker's* contract with the defendant would be no default

RULE II.
Ante, p. 123.

Hargreaves
v. Parsons.

Conrad, (1894) 2 Q. B. 885, and also in *In re Bolton's Estate, Morant v. Bolton* (1892), W. N. 114, 163.

(d) 13 M. & W. 561. (e) 11 A. & E. 438. (f) 8 B. & C. 728.

RULE II.
Ante, p. 123.

towards the plaintiff, and, consequently, the undertaking by the defendant was no promise to answer for the default or miscarriage of *Parker* in any debt or duty towards the plaintiff. It was an original promise that a certain thing should be done by a third person."

Thomas v.
Cook.

The case of *Thomas v. Cook* (a) proceeded upon the same principle. There it had become necessary for *Cook* (who was a debtor of one *Morris*) to find sureties. He applied to the plaintiff to join him in a bond and bill of exchange, and undertook to save him harmless. It was *held*, that the promise of the defendant was not within the 4th section of the Statute of Frauds. *Bayley, J.*, in his judgment, says: "Here the bond was given to *Morris* as the creditor, but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor." *Parke, J.*, said, "If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same."

The cases of *Green v. Cresswell* (b) and *Cripps v. Hartnoll* (c), when read together, also will exemplify the rule laid down by Baron *Parke* in *Hargreaves v. Parsons* (*ante*), that the 2nd clause of the 4th section of the Statute of Frauds "applies only to promises made to the persons to whom another is already or is to become liable."

Green v.
Cresswell.

In *Green v. Cresswell* (d) the plaintiff became bail for another person in a *civil* case, at the request of the defendant, in consideration of the defendant promising to indemnify the plaintiff against the consequences. It

(a) *Supra*. This case, as already stated, *ante*, p. 50, was approved of by the Court of Appeal, in *Guild & Co. v. Conrad*, (1894) 2 Q. B. 885, and also in *In re Bolton's Estate, Morant v. Bolton* (1892), W.N. 114, 163.

(b) 11 A. & E. 453.

(c) (In Cam. Scac.), 4 B. & S. 414, reversing the decision of the Q. B. in 2 B. & S. 677.

(d) *Supra*.

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Ante, p. 123
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was held, that no action lay on the defendant's promise, as it was not in writing. In *Cripps v. Hartnoll* (e), on the contrary, where the plaintiff, at the request of the defendant, entered into a recognizance of bail for the appearance of a third person to answer a *criminal* charge, and the defendant, in consideration thereof, promised to indemnify the plaintiff against all liability and from all costs, damages and expenses in respect of the same; it was *held*, that the defendant's promise was not within the 4th section of the Statute of Frauds. The distinction between these two cases is well pointed out by *Williams, J.*, in his judgment in the case last cited: "I ought," he says, "to remark, that I do not deem it at all necessary for us to say whether the case of *Green v. Cresswell* is good law or not, but I think there is a distinction between the recognizance of bail in a *civil* suit and the recognizance given for the appearance of a defendant in a *criminal* proceeding; whether, in a case where the plaintiff becomes bail for a stranger in a *civil* suit, there is a duty, as between the defendant in the action and the surety, that he will render or pay the debt, so as to reconcile the case of *Green v. Cresswell* with the doctrine that the statute applies only to promises made to a person for whom another is answerable, I think that, where bail is given in a *criminal* suit, there is certainly no debt or duty which can be considered as due to the surety from the party on whose behalf the recognizance is given. The statute, therefore, cannot be held to apply to such a case without overruling the doctrine to which I have alluded, which was not disputed in argument before us, and is established by the cases of *Eastwood v. Kenyon* and *Hargreaves v. Parsons*. In *Thomas v. Cook* it may be observed that, although *Bayley, J.*, puts the case upon the ground that the 4th section of the Statute of Frauds does not apply to a promise to indemnify, *Parke J.*,

(e) 4 B. & S. 414.

RULE II.
Ante, p. 123.
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afterwards Lord *Wensleydale*, who was the only other judge in that case, certainly does not put it at all upon that ground."

Castling v.
Aubert.

It remains to notice that there are also one or two cases which, although not decided upon this 'ground, may be supported upon the principle that a promise to answer for another's debt, default or miscarriages, is not within s. 4 of the Statute of Frauds, unless it be made to the creditor himself. The case of *Castling v. Aubert* (a) is an instance of this kind. There the plaintiff, being a broker, had, as such, a lien upon certain policies of insurance for acceptances he had given for A. The defendant, who was also a broker, being employed by A. to conduct his insurance business, was anxious to procure the policies in order to collect, for his principal, the moneys due thereon, and, accordingly, induced the plaintiff to part with his lien on the said policies by *verbally* promising to provide for the plaintiff's acceptances at maturity. It was held, that the defendant's promise was not within the 4th section of the Statute of Frauds. Now, here it will be observed that, as first pointed out by Mr. *Throop* in his work on the Validity of Verbal Agreements (b), the promise of the defendant was made to one who, as acceptor, was a principal debtor, and this reason is, of itself, sufficient to exclude the case from the operation of the statute. It is proper to observe, however, that the case is put upon other grounds in the judgment, which rests the decision upon the principle that the transaction was to be considered as a purchase by the defendant of the plaintiff's interest in the policies—a promise by the defendant to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him with the means of doing so—and that it, therefore, fell within the decisions which have before been considered (c).

(a) 2 East, 325.

(b) See p. 389.

(c) See *ante*, p. 77.

A similar case is *Love's case* (*d*), where the sheriff had taken goods in execution upon a *fi. fa.*, and a promise to the officer, by a third party, to pay him the debt, in consideration that he would restore them, was held to be an original promise not within the statute. This case, like *Castling v. Aubert*, just cited, may be supported upon the ground that the promise was not made to a person to whom another was already liable, and, therefore, fell within *Eastwood v. Kenyon* (*e*) and *Hargreaves v. Parsons* (*f*); although it may also be placed upon the ground that after the seizure the goods, and not the execution debtor, were liable for the debt, and that the decision consequently fell within the principle of a class of cases which have before been discussed (*g*).

A promise made by a man to *himself and others* is not, it seems, within the 4th section. For this proposition, *In re Hoyle*, *Hoyle v. Hoyle* (*h*) is apparently the only authority. There the promise took this form: "I promise the firm, of which I am a member, that if my son *Savile* (also a member of the firm) do not pay the firm, I will make good the loss to the firm." As there was held to be sufficient evidence in writing of this promise, it became unnecessary to decide whether it was within the statute, and *Smith*, L.J., declined to do so. *Lindley*, L.J., however, stated his view to be that it was outside the statute, and *Bowen*, L.J., concurred with him in so thinking, stating that it was a promise made by a man to himself and other people, whereas a promise at law can only be made to *others*. In order to bring the promise within the 4th section, it would also seem to be necessary that it should be made to a person able to sue the principal debtor. Thus a promise by one partner to his co-partners to pay to the firm money due

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Ante, p. 123.

Lore's Case.

Semble,
promise made
by one to
*himself and
others* is not
within the
4th section.

In re Hoyle,
Hoyle v
Hoyle

(*d*) 1 Salk. 23. (*e*) 11 A. & E. 438. (*f*) 13 M. & W. 561.

(*g*) See *ante*, p. 80. (*h*) (1893) 1 Ch. 84.

RULE II.
Ante, p. 123.

from a third party, also a member of the firm, would be outside the statute (a). Indeed such a promise would not be actionable at law, whether in writing or not, and could only be enforced in equity by a suit for an account (b).

Promiser's
liability
must arise
from his
express
promise only.

Fitzgerald v.
Dressler.

RULE III.—*There must be an absence of all liability or interest on the part of the promiser (the surety), except such as arises from his express promise.*

The decision of the Court of Common Pleas in *Fitzgerald v. Dressler* (c) expressly recognizes the existence of a general rule to the effect here set out. Before that decision there had been (as we shall presently see) numerous cases, the decisions in which are in truth to be referred to the existence of this rule; but the rule itself never seems to have been before propounded in terms. The facts in *Fitzgerald v. Dressler* were as follows: A. sold goods to B., through a broker, which goods B. afterwards sold to C. through the same broker. C. was under terms to pay B. for the goods, before the time fixed for payment from B. to A. In order to induce A. to hand over the goods before the day fixed for payment of the goods by B., C. promised A. that B. should pay on the day named. A. accordingly parted with his vendor's lien. It was held, that C.'s promise was not within the 4th section, because at the time of C.'s promise the goods were the property of C., subject to A.'s lien for the price. *Cockburn, C.J.*, in delivering judgment, said: "We are all agreed that the case is not within the Statute of Frauds. The law upon this subject is, I think, correctly stated in the notes to *Forth v. Stanton*, 1 Wms. Saund. 211, e, where the learned editor thus sums up the result of the authorities: 'There is considerable difficulty in the subject, occasioned,

(a) *In re Hoyle, Hoyle v. Hoyle, supra.*

(b) *Ib. per LINDLEY, L.J.*, at p. 97.

(c) 7 C. B. (N.S.) 374.

perhaps, by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question whether any particular case comes within this clause of the statute (s. 4) or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property; it being, as I think, truly stated there, as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default or miscarriage of another, where the person making the promise has no interest in the property which is the subject of the undertaking. I therefore agree with my learned brothers that this case is not within the Statute of Frauds."

In the very recent case of *Sutton & Co. v. Grey* (d) the Court of Appeal recognised the rule under consideration as a true test of whether a promise is within the 4th section, *Lopes*, L.J., expressing himself as follows,

(d) (1894) 1 Q. B. 285, C. A.

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Ante, p. 130.

viz.: "The true test, as derived from the cases is, as the Master of the Rolls has already said, to see whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise."

Many cases referable to this rule (III.), *semble*, decided on wrong grounds.

The rule, in the terms in which it is thus set forth, is, it is submitted, the true rule, and one which will on examination be found to support a large number of cases which without it seem difficult to understand, and some of which, in the absence of the explanation afforded by it, appear to conflict with each other. But it is only right to observe that, in many cases which it is submitted are really illustrations of the present rule (*a*) and in some others also (*b*), the reason given for their exception from the operation of the Statute of Frauds is, because there was a new consideration arising between the plaintiff and defendant, or as it is sometimes put, because the consideration was an advantage to the defendant rather than to a third party. Now, it is submitted that though these cases are rightly decided, yet that the test suggested by them for ascertaining whether a case falls within that portion of the Statute of Frauds relating to guarantees or not, is by no means satisfactory. For, if you adopt as a test the question, "Is there a new consideration arising between the creditor and the promiser?" or the question, "Is the consideration an advantage to the defendant rather than to a third party?" you give rise to great misconception. It either leads to the supposition that a promise to be answerable for the debt,

The nature of the promise determines

(*a*) See *Houlditch v. Milne*, 3 Esp. 86; *Walker v. Taylor*, 6 C. & P. 752; *Williams v. Leper*, 2 Wils. 308; *Thomas v. Williams*, 10 B. & C. 664.

(*b*) See *Edwards v. Kelly*, 6 M. & S. 204; *Tomlinson v. Gill*, Amb. 330.

default or miscarriage of another person, requires no consideration at all to support it: or to the equally erroneous supposition, that the consideration for such a promise *must* be an advantage to the promiser. Besides, either of the above-mentioned tests concentrates the attention upon the *consideration* for the promise, instead of upon the *promise* itself; and whatever formerly may have been the rule, it is quite clear now that, to determine whether or not a case falls within the 2nd clause of the 4th section of the Statute of Frauds, the question to be asked is, "What is the *promise*? not what is the *consideration* for such promise?" (c).

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Ante, p. 130.

whether
statute
applies.

The only case in which the consideration can affect the terms of the promise is, where the consideration is the *extinguishment* of the liability of the original party.

It will be best to consider under different heads the various cases which it is submitted really fall within the rule now under consideration, but in which another and different reason for their being outside the Statute of Frauds was given by the judges who decided them. The first class of cases of this kind are those in which a lien or some similar security has been given up in consideration of the defendant's promise. A good instance of this sort is afforded by the case of *Walker v. Taylor* (d). There one of the partners of a firm of distillers having died, his widow deposited with the undertaker of her husband's funeral the beer and spirit licences of the house, as security for the payment of his bill. Being in want of these licences the surviving partner promised the undertaker that, if he would give them up, he would pay his bill for the funeral. It was held, that the undertaker, having given up the licences to the surviving partner, might recover his bill against him, although the widow was his original employer,

Cases in
which a lien
or other such
security
given up in
consideration
of defendant's
promise.

Walker v.
Taylor.

(c) See also observations on this subject in 1 Wms. Saund. (1871 ed.), note to *Forth v. Stanton*, p. 232.

(d) 6 C. & P. 652.

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Ante, p. 130.

and although he had made out his account charging the administrator as his debtor. On its being suggested that the above promise of the surviving partner to the undertaker was to pay the debt of another, *Tindal*, C.J., said, "You mean under the Statute of Frauds. But it is a new contract, under a new state of circumstances. It is not 'I will pay if the debtor cannot;' but it is, 'In consideration of that which is an advantage to me, I will pay you this money.' There is a whole class of cases in which the matter is excepted from the statute on account of the consideration arising immediately between the parties. It is a new contract; it has nothing whatever to do with the Statute of Frauds at all" (a). In this case it is to be noticed that the defendant, being part owner of the property which formed the subject of the lien, was liable independently of his promise. The cases of *Gull v. Lindsay* (b), and *Clancy v. Piggott* (c), seem at first sight to conflict with *Walker v. Taylor* (*supra*), and with the case of *Houlditch v. Milne* (which has been cited at a previous page) (d). It is, however, submitted that these cases are easily reconcilable when viewed by the light of the explanation which Rule III. affords. In *Gull v. Lindsay*, the plaintiff (an agent) was employed to procure charterers for a ship, on the terms of paying himself out of the freight which he was to receive for that purpose. Before the freight was earned the ship changed owners, and the new owners being anxious to obtain possession of the ship, the defendants, who were the brokers of the new owners, promised plaintiff that if he would abandon his right of receiving the freight, they, the defendants, would pay him his said commission. It was held, that this was an agreement to answer for the debt

Gull v.
Lindsay.

(a) See Chitty on Contracts, 8th ed., p. 478, for observation on this case, which, however, is not repeated in the subsequent editions.

(b) 4 Exch. 45.

(c) 4 Nev. & Mann. 496.

(d) See *ante*, p. 77, where the case is discussed under Rule I.

of another within the Statute of Frauds. *Pollock, C.B.*, RULE III. 'Ante, p. 130.
 in giving the judgment of the court making the rule absolute to set aside a verdict which had been entered for the plaintiff, and to enter a nonsuit or verdict for the defendant, (*inter alia*) said: "We think that the defendants' counsel were right in saying that this contract was a contract made to pay the debt of another within the Statute of Frauds. It was not a case of transfer of liability, as if A. had agreed to accept C., a debtor of B., as his debtor, in lieu of him. It is plain that, although the defendants agreed to pay the plaintiff, *yet the debt to him still remained due from the owners by whom he was retained*. It was, therefore, necessary that the consideration should appear in writing, signed by the defendants; and the consideration we have already stated is a very different one from that declared on."

In *Clancy v. Piggott (e)*, the declaration in assumpsit stated that A. owed the plaintiff 5*l.*, and that the plaintiff had a lien on goods of A.; that the defendant, in consideration that the plaintiff would abandon such lien and restore such goods to A., promised to see him paid the said 5*l.* within three months. Averment, that plaintiff abandoned his lien. The plea alleged that this was a promise within the Statute of Frauds, and that there was no agreement in writing stating the consideration. It was held, that the promise was clearly within the meaning of the Statute of Frauds. Now, it is submitted that the two cases just cited do not in reality, and when explained by Rule III., at all conflict with the authorities previously mentioned. For in the two cases just cited the persons making the promises were not the owners of the property which formed the subject of the lien, and were not under any liability whatever independently of the promise; whereas, in the other cases, the promises were made by

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Ante, p. 130.

persons who, being sole or part owners of the property subject to the lien, were under some liability independently of such promises, *i. e.*, were liable on the part of their property. To the latter and not to the former cases, therefore, the rule given in *Wms. Saunders*, which we have already mentioned, and which is adopted in *Fitzgerald v. Dressler*, as we have shown above, applies (*a*).

Thomas v.
Cook.

A further example of a case, which it is submitted is in reality founded on the rule now under discussion, is that of *Thomas v. Cook* (*b*). In that case it was decided that, under the state of facts there before the court, a promise to indemnify a person, if he would become surety for another, was not within the 4th section of the Statute of Frauds. *Thomas v. Cook* (*c*), according to *Bayley, J.*, was decided on the ground that a promise to indemnify does not fall within either the words or the policy of the Statute of Frauds (*d*); and according to *Parke, J.*, on the ground that the promise in question was nothing more than an original one. There was, however, another reason for holding, in the particular case of *Thomas v. Cook*, that the Statute of Frauds did not apply. In *Thomas v. Cook*, the defendant (who gave the promise of indemnity) was surety *jointly* with the plaintiff (the promisee) for the person for whom the plaintiff became surety, at the defendant's request. Consequently, independently of his express promise, the defendant was liable to indemnify the plaintiff to a certain extent, owing to the operation of the doctrine of contribution amongst sureties, which we shall treat

(*a*) The case of *Castling v. Aubert*, 2 East, 325, very much resembles the cases just discussed. This case has been already fully noticed, *ante*, pp. 77, 128 *et seq.*

(*b*) 8 B. & C. 728. As previously stated, this case was followed and approved of in *Guild & Co. v. Conrad*, (1894) 2 Q. B. 885, C. A., and also in *In re Bolton's Estate*, *Morant v. Bolton* (1892), W. N. 114, 163.

(*c*) *Ubi supra*.

(*d*) See this observation commented on, *ante*, pp. 56, 57, *et seq.*

of later on (e). For this reason, therefore, the case, it is submitted, falls within the rule recognized in *Fitzgerald v. Dressler* (f). RULE III.
Ante, p. 130.

Another class of cases which in reality also falls within the rule we are now applying, but which has been supposed to rest on other grounds, remains to be considered. These are cases in which, in consideration of the defendant's promise, a right to distrain another's goods is given up. Now, in all the cases of this description which are about to be cited, it will be noticed that the person giving the promise, if not *actual owner* of the goods about to be distrained, had at least *an interest* in them so as to bring the promises within the rule laid down in *Fitzgerald v. Dressler* (*supra*). At the same time it should be borne in mind that to such cases the remark, which has in substance been before made, applies with peculiar force, namely, that though the decisions themselves are correct, the conflicting reasons given for them by the judges are unsatisfactory in the extreme; and that in none of them is *that* reason for the decision given which it is submitted is the true reason, namely, that the party promising was *owner* or at least *interested in* the goods distrained. A leading case of this class is that of *Williams v. Leper* (g). Cases in which, in consideration of defendant's promise, right to distrain goods of third party given up.
Williams v. Leper. There a tenant of a messuage belonging to the plaintiff was in arrear for rent and was also insolvent. He accordingly made a bill of sale to the defendant (*Leper*) of all his goods in the messuage, in trust to be sold for the use of his creditors. The defendant advertised these goods for sale in the messuage, and on the morning fixed for the auction the plaintiff, as landlord, came to distrain the goods. *Leper*, on being informed of the plaintiff's intention to distrain, promised the plaintiff to pay him the rent in arrear if he would

(e) *Vide post*, Chap. V.

(f) 7 C. B. (N.S.) 374, *ante*, p. 56.

(g) 2 Wils. 308; 3 Burr. 1886. See also pp. 79, 80, 81, where this case is cited under Rule I.

RULE III.
Ante, p. 130.

Bampton v.
Paulin.

desist from distraining. It was held, that the promise of the defendant was not within the 4th section of the Statute of Frauds. A sufficient reason for this decision is, because the defendant had under the bill of sale *an interest in the property liable to distress*. A similar case to *Williams v. Leper* is that of *Bampton v. Paulin (a)*. There it appeared that the defendant, an auctioneer, was employed by A. and B. to sell goods on certain premises for which rent was in arrear. The landlord applied to the defendant, the auctioneer, for the payment of such arrears of rent, saying that it was better to apply so than to distrain. The defendant, after inquiring the amount, said, "You shall be paid; my clerk shall bring you the money." It was held that this case was not distinguishable from *Williams v. Leper*, and that an action lay on the defendant's promise without a note in writing. Now, in this case, as in *Williams v. Leper*, the only true and intelligible ground for the decision is, that the party making the promise, though not the actual owner, yet had an interest in the goods about to be distrained.

Thomas v.
Williams.

To a similar effect is the case of *Thomas v. Williams (b)*. There the plaintiff's tenant was in arrear for rent, and the defendant, an auctioneer, was employed by such tenant to sell his goods. The plaintiff, on the day fixed for the sale, went on the premises to distrain for an unpaid balance of rent due the preceding Lady-day. The defendant promised the plaintiff that if he would not distrain, he would pay him, not only the rent in arrear, but also rent that would accrue due on the following Michaelmas. It was held that, though the promise, so far as regarded the payment of rent in arrear, was not within the 4th section of the statute, yet that that portion of it which related to rent to become due was within the statute; and that, therefore, in the absence of written evidence of the promise, the

(a) 4 Bing. 264.

(b) 10 B. & C. 664.

whole was void. This decision is quite in harmony with the other cases above cited, and is in remarkable accordance with the rule in *Fitzgerald v. Dressler*; for clearly, though as regarded the rent in arrear, property in which defendant had an interest was liable to distress, this was not the case as regarded the rent to become due, for which therefore neither the defendant, independently of his promise, nor property in which he had an interest, was liable.

RULE III.
Ante, p. 130.

Lord *Tenterden*, C.J., in delivering the judgment of the court in this case, said the plaintiff could not have distrained for rent not yet due. "The defendant, by paying all that was due to Lady-day, might have proceeded to sell the goods. If that sum were paid or secured, the plaintiff sustained no loss or detriment by the sale of the goods. So that the promise to pay the accruing rent exceeded the consideration, and cannot be sustained on the ground on which the cases referred to are to be sustained, but is nothing more than a promise to pay money that would become due from a third person, and is within the words of the statute, and the mischief intended to be remedied thereby. And, as to so much, therefore, the promise is void by the statute."

Another class of cases, which, it is submitted, are referable to the rule now under consideration (Rule III.), are promises to answer for your *own* debt. It is settled that such promises are not within the Statute of Frauds, which is confined in its application to promises to answer "for the debt, default or miscarriages" of *another*" (b). In these cases, you are liable independently of your promise.

Promises to
 answer for
 promiser's
 own debt.

The case of *Ardern v. Rowney* (c) is an instance of this class of cases. In *Ardern v. Rowney* these were the facts. One *Alder* (who afterwards became a bankrupt) applied to the plaintiff to discount a cheque for 100*l.*,

Ardern v.
Rowney.

(c) *Ante*, p. 64, 65, *per* BOWEN, L. J., in *In re Hoyle, Hoyle v. Hoyle*, (1892) 1 Ch. at p. 99.

(d) 5 Esp. 254.

RULE III.
Ante, p. 130.

drawn by *Alder* upon *Rowney*, the defendant. Before the plaintiff would give cash for it he sent his clerk to the defendant, who asked the defendant if the draft was a good one. The defendant answered that it would be honoured, as he was in *Alder's* debt 200*l.* The plaintiff's clerk then observed that the cheque was post dated, and could not, therefore, be recovered. The defendant said that that did not signify, and that it should be paid. The plaintiff advanced the money, which was never repaid. The plaintiff having accordingly brought assumpsit against the defendant on the cheque for 100*l.* money had and received, with the other common money counts, it was objected that the plaintiff could not recover on the count on the cheque, as it was *admitted* to be void; and as to the second, the defendant's counsel said it was clear that if this was a mere promise of the defendant, by which he promised the plaintiff that if the plaintiff would advance 100*l.* on his cheque to *Alder*, he would pay it, it would be decidedly void within the Statute of Frauds, as being a promise to pay the debt of another without a note in writing, so that it could not be money had and received. Lord *Ellenborough*, C.J., said, that if this had been an agreement to pay the amount of any money which the plaintiff might advance to *Alder*, and no specific sum of money had been mentioned which was to be advanced, the case would have been within the Statute of Frauds. He held, however, that this was an appropriation of 100*l.*, part of the money which the defendant said he owed to *Alder*, amounting to 200*l.*, and that the plaintiff might recover. It was then suggested by the defendant's counsel that plaintiff could not recover beyond the money actually due by *Rowney* to *Alder*, and, on his showing that 80*l.* only was due, Lord *Ellenborough* directed the verdict to be entered for that amount.

Hodgson v.
Anderson.

Again, in *Hodgson v. Anderson* (a), A. was indebted

(a) 5 D. & R. 735; S. C., 3 B. & C. 842.

to B., while C., who resided abroad, was indebted to A. A. proposed to assign to B. the debt owing from C. to him, which B. agreed to accept. A. wrote to C.'s agents in this country, "As soon as you have funds belonging to C., pay, on my account, to B. 291*l.* 10*s.*, and I will credit C., *having received his order to that effect.*" C.'s agents *verbally* promised B. to pay him as soon as they should have funds of C. in hand. A. afterwards ordered C. to pay to another creditor the debt owing from C. to A., and C. gave an undertaking to pay that creditor, with a memorandum, stating that as it was alleged that a payment had been made by some person to A., on account of C., it was declared that should C. prove such payment to have been made, the amount should be deducted. C. refused to pay the debt to this latter creditor, on the ground that his agents were liable to pay it to B., and C.'s agents, in fact, afterwards paid it to B. It was held (*inter alia*), that C.'s promise to pay B. was not a promise to pay the debt of a third person, and therefore was not within the Statute of Frauds. *Bayley, J.*, in his judgment in this case, says, "I think the case is not within the Statute of Frauds, because it was a promise by the defendant to pay his own debt with his own money, only paying it to the banking company instead of to the plaintiff. It was not a promise to pay with his own money the debt of the plaintiff, a third person. A written promise, therefore, was not necessary, in order to impose upon the defendant an obligation to pay the banking company, because there was no agreement to pay money which the party, by law, was not obliged to pay; there was a full and adequate consideration for the payment."

Another case, of this same class, is *Stephens v. Squire (b)*, *Stephens v. Squire*. in which the facts were as follows:—An action was brought against *Squire*, an attorney, and two others, for appearing for the plaintiff without a warrant. The

RULE III.
Ante, p. 130.

cause was carried down to be tried at the assizes, and the defendant (*Squire*) promised that, in consideration that the plaintiff would not prosecute the action, he would pay 10*l.* and costs of suit. On this promise another action was subsequently brought against *Squire*. The question was, whether the 4th section of the Statute of Frauds required this promise to be in writing. The court was of opinion that this could not be said to be a promise for another person, but for his *own* debt, and that it was, therefore, not within the statute. Now, in this case it will be observed that *Squire*, the defendant, was, independently of his express promise, partially liable, at all events, to the plaintiff. This case, therefore, could not be effected by the Statute of Frauds. Mr. Fell, in his work on Guarantees (*a*), gives as a reason for taking this case out of the statute, that the defendant, who made the promise on which the action was brought, was *interested* in the original transaction. An apt illustration of the principle now under consideration is also furnished by the case of *Orrell v. Coppock* (*b*), in which the following were the facts:—A testator appointed his son, *Alfred Orrell*, and three other persons, trustees and executors of his will. *Alfred Orrell* disclaimed and renounced probate, and afterwards purchased a portion of the testator's property. One of the trustees named *Winterbotham*, who proved the will, was transported, and Mrs. *Brooks*, a daughter of the testator, expressed dissatisfaction at the way in which the trustees had acted, and claimed 5,000*l.* from *Alfred Orrell*. *Alfred Orrell* denied all knowledge or participation in the matters in dispute, but, for the sake of peace, instructed his solicitor, Mr. *Coppock*, to make some pecuniary offer. Mr. *Coppock* ultimately wrote on behalf of *Alfred Orrell* to the claimants, agreeing to pay 3,000*l.* in satisfaction of the alleged losses Mr. and Mrs. *Brooks* had sustained from the acts of the trustees.

(a) 2nd ed., pp. 18, 19.

(b) 26 L. J. Ch. 269.

Orrell v.
Coppock.

It was held that, as against *Alfred Orrell*, this letter was not within the Statute of Frauds as an agreement to answer for the debt, default or miscarriage of another, and that it was not invalid for want of consideration. The reason for this decision is ably given by *Kindersley*, V.-C., in his judgment in the case. He says: "Now it is clear, according to this arrangement, that it was not a case in which Mr. *Alfred Orrell* was saying, 'A. B. and C. D. may be liable to you, and I will undertake that if they do not pay this debt I will.' It is no such case. It cannot be said to be an agreement for any debt, default or miscarriage of another, within the meaning of the Statute of Frauds; that statute does not apply to the case where a party giving the guarantee is *himself liable to the demand* which he is purporting to guarantee, it must be *exclusively* the debt, default or miscarriage of the other to bring it within the statute; and therefore it appears to me that, in this case, when Mr. *Alfred Orrell* was incurring this obligation it was not merely to satisfy the debt of another, but the debt which, it was insisted, rightly or wrongly, that he was liable for; and it is clear, from the arrangement, that none of the losses, except that of *Winterbotham*, were individual, but that all were liable for those losses, and therefore *Alfred Orrell* was not only to be himself discharged, but all the others."

RULE III.
Ante, p. 130.

A promise that a promiser's agent shall, on a certain event, pay money, or that, on his failure to do so, the promiser will, is not one to which the Statute of Frauds applies, as such promise is merely expressive of an already-existing liability on the part of the promiser (c). So, again, it was held, in a case decided long before the Married Women's Property Acts, that a promise to pay money lent to the wife of the promiser at his request is not a collateral undertaking, as there is such a privity and union between them that a loan to the

Promise, by principal, that if his agent does not pay he will, not within § statute.

Application of statute to a promise by husband to pay wife's debt, or by wife to pay

RULE III.
Ante, p. 130.

husband's
 debt.
 Guarantee
 by husband
 for his wife,
semble now
 within
 statute.

wife must be treated as a loan to the husband (a). On the other hand, a promise by a wife to pay her husband's debt out of her separate estate is strictly collateral, and must be in writing (b). It is submitted that any guarantee given since the Married Women's Property Act, 1882, by a husband to secure repayment of money lent to a wife having separate estate, is within the Statute of Frauds, and is not enforceable against him unless it be in writing (c).

RULE IV.

Main object
 of the
 promise must
 be to secure
 fulfilment of
 third party's
 obligation.
 Difficulty of
 applying this
 rule.

RULE IV.—*The main, or immediate, object of the agreement between the parties must be to secure the payment of a debt, or the fulfilment of a duty, by a third person.*

It cannot but be a matter of regret that the judges should ever have laid down the above rule, as one test for ascertaining whether the 2nd clause of the 4th section of the Statute of Frauds applies to a particular agreement. Its application must obviously be attended with much difficulty. It is also to be regretted that, this rule once established, it should not *always* have been adhered to, and that in many cases in which one would suppose it to apply it is not even noticed in the decisions (d). The first case in which the rule in question appears to have been laid down is *Castling v. Aubert* (e). There the plaintiff, a broker, having a lien

Castling v.
Aubert.

(a) *Stevenson v. Hardie*, 2 W. Black. 872; and see *ante*, p. 101.

(b) *Wilcocks v. Hannington*, 5 Ir. Ch. Rep. 38; and see *Robinson v. Gee*, 1 Ves. sen. 251; *Huntingdon v. Huntingdon*, 2 Bro. Parl. C. 1.

(c) *Ante*, p. 98 *et seq.* It is now provided by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), that every contract entered into by a married woman, otherwise than as agent, shall be deemed to be a contract entered into by her with respect to and bind her separate property.

(d) See many of the cases cited *ante*, as illustrations of Rule 1. This rule is adopted with seeming approval, in Selwyn's *Nisi Prius*, vol. ii., 13th ed., p. 777, and see *Sutton & Co v. Grey*, (1894) 1 Q. B. 285, C. A., *post* p. 155, 156.

(e) 2 East, 325; cited also *ante*, pp. 77, 128.

on certain policies of insurance, effected for his principal (one *Grayson*), for whom he had given his acceptances, the defendant promised that he would provide for such acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters. This was accordingly done, and the money was afterwards received by the defendant. It was held, that this was not a promise within the 4th section of the Statute of Frauds. Lord *Ellenborough*, C.J., in his judgment, says: "I am clearly of opinion that this is neither an undertaking for the debt, default or miscarriage of another person within the statute. It could not be for the *debt*, but rather for the *credit*, of another; for when the promise was made, no debt was incurred from *Grayson* to the plaintiff; therefore, if at all within the statute, it must be for the default or miscarriage of another. But see what the case is. The plaintiff, who was *Grayson's* broker, had policies of insurance in his hands belonging to his principal, which were securities on which he had a lien for the balance of his account, and on the faith of these he agreed to accept bills for the accommodation of his principal. One of these bills became due, and actions were brought against the plaintiff as acceptor, and against *Grayson* as drawer; and it was desirable that the policies should be given up by the plaintiff to the defendant in order to enable the money for the losses incurred to be received from the underwriters, the defendant undertaking, upon condition the policies were made over to him, to settle the acceptances due, and lodge money in a banker's hands for the satisfaction of the remainder as they became due. The defendant then procured from the plaintiff the securities upon the faith of this engagement, *in entering into which he had not the discharge of Grayson principally in his contemplation, but the*

RULE IV.
Ante, p. 144.
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RULE IV.
Ante, p. 144.

discharge of himself. That was his moving consideration, though the discharge of *Grayson* would eventually follow. It is rather, therefore, a *purchase* of the securities which the plaintiff held in his hands. This is quite against the mischief provided against by the statute, which was that persons should not by their own unvouched undertaking, without writing, charge themselves for the debt, default or miscarriage of another. In the case of a bill of exchange for which several persons are liable, if it be agreed to be taken up and paid by one, eventually others may be discharged; and the same objection might be made there; but the moving consideration is the discharge of the party himself, and not of the rest, though that also ensues. Upon the whole, therefore, I agree with the decision in *Williams v. Leper* to the full extent of it. I agree with those of the judges who thought the case not within the Statute of Frauds at all." A similar view was put forward by the court in the case of *Elkins v. Heart* (a), which we have had occasion to cite before, though upon another point (b). In that case the payment of the third party's debt was not the *main* object of the agreement between the parties, as will be seen on examination of the facts, which were as follows. The plaintiff having sued J. G., the defendant's son-in-law, for money due from him to the plaintiff for diet and lodging, the defendant promised, in consideration that the plaintiff would forbear to sue the said J. G. for the said sum, that the said J. G. should not leave the kingdom without paying the same. The court inclined to the opinion that this case was not within the 4th section of the Statute of Frauds. Now here, clearly, the *main direct* object of the agreement between the parties was to prevent the third party leaving England; the indirect object was the payment of such third party's debt. Of course, on such third party leaving

Elkins v.
Heart.

(a) *Fitzg.* 202.

(b) See *ante*, p. 91, under Rule I.

England, the measure of the damages against the defendant would be the debt due from such third party. This circumstance would not, however, alter the nature of the transaction and bring it within the 4th section of the Statute of Frauds, if it were not so for other reasons. Another authority in which the rule under consideration appears to have been recognized is that of *Macrory v. Scott* (c). In that case it appeared that a certain judgment was given to the plaintiff by the defendant as security for advances which the plaintiff had made to the firm of *Scott Brothers* at the defendant's request. Afterwards, in consideration that the plaintiff would discharge *Scott Brothers* from all their existing liabilities, and would pay to the *Ulster Banking Company* 800*l.*, and would also advance to *Scott Brothers* 200*l.*, it was agreed by the defendant that the said judgment against him should remain as a security for the 1,000*l.* This agreement being evidenced by a memorandum or note in writing, sufficient to satisfy the Statute of Frauds, it was unnecessary for the court to decide on the above-mentioned facts, whether the case was within the statute. *Parke, B.*, however, in his judgment in the case, says: "First it is said that there ought to be a note or memorandum in writing, because this is a promise to be answerable for the debt or default of another, within the Statute of Frauds. But I do not think this case is within that statute. *It is not directly a promise to pay the debt of another*, but an agreement stating that property already pledged for one debt shall remain pledged for another. Although the ultimate effect is that the debt may be paid, *yet the immediate object is merely to appropriate the fund in a different manner*. It therefore falls within the principle of the decision in *Castling v. Aubert*" (d). And again Baron *Martin*, in his judgment in the same case, says: "The substance of

RULE IV.
Ante, p. 144.

Macrory v. Scott.

(c) 5 Exch. 907.

(d) 2 East, 325.

RULE IV.
Ante, p. 144.
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the arrangement was, that the defendant, who had been a party to a former judgment, should permit the judgment to remain as a security for 1,000*l.*, which was to be advanced and given by the plaintiff to the *Ulster Banking Company*, on the terms of his *discharging Scott*. The transaction is, in effect, this:—‘I, the defendant, will consent to the judgment against me remaining as a security if you, the plaintiff, will wipe off all existing demands against *Scott & Co.*, and advance 800*l.* to the *Ulster Bank* and 200*l.* to *Scott & Co.*’ To my mind this is clearly not a case within the Statute of Frauds. It is not an undertaking to answer for the debt, default or miscarriage of another; but an agreement that a certain existing obligation shall continue. The cases, all of which will be found in the note to *Forth v. Stanton*, establish that, for the purpose of bringing a contract within the Statute of Frauds, it must be an engagement for the debt, default or miscarriage of another, which this is not. So that, even if it had been a *parol* contract, it would have been perfectly good, as the Statute of Frauds does not apply.”

Jarmain v.
Algar.

The case of *Jarmain v. Algar* (a), which has been before cited (b), may, perhaps, also be considered as having turned upon the operation of the rule (Rule IV.) now under discussion.

In *Jarmain v. Algar* it was held, that a promise by a party to execute a bail bond on a writ to be sued out against A. B., in consideration of the plaintiff forbearing to arrest A. B., on a writ already sued out, is not a promise to answer for the debt, etc., of another within the 4th section of the Statute of Frauds. The reason for this *nisi prius* decision does not appear from the report of the case in 2 Carrington & Payne. It is submitted, however, that the reason may very probably have been because the *immediate* or *main* object of the

(a) 2 C. & P. 249.

(b) *Ante*, p. 86.

transaction was not the payment of a third party's debt, though this might be indirectly attained. RULE IV.
Ante, p. 144.

The most remarkable instance in which the rule now under consideration (Rule IV.) applies, and, consequently, excludes the operation of the 4th section of the Statute of Frauds, is, undoubtedly, the case of a *del credere* (c) agent. A *del credere* agent is, as is well known, an agent who, for a higher commission, guarantees the solvency of the purchasers of the goods of his employers,—in other words, is answerable for the debts of third persons. Now, a *del credere* agent is not answerable in the first instance (d), though this was once thought to be the case (e). He is really nothing more than a surety. The nature of this liability is thus defined by Lord *Ellenborough*, C.J., in delivering the judgment of the Court of King's Bench in *Morris v. Cleasby* (f):—"In correct language," he remarks, "a commission *del credere* is the premium or price given by the principal to the factor for a guarantee. . . . But, whatever term is used, the obligation of the factor is the same; it arises on the guarantee. The guarantor is to answer for the solvency of the vendee, and to pay the money if the vendee does not; on the failure of the vendee, he is to stand in his place and make his default good." Many ingenious suggestions have been made by learned text writers for the purpose of justifying the exclusion from the operation of the 4th section of the Statute of Frauds of the undertaking of a *del credere* agent (g). Promise by a
del credere
agent not
within
statute.

Morris v.
Cleasby.

A complete summary of the various views upon the

(c) "The phrase *del credere* is borrowed from the Italian language, in which its signification is exactly equivalent to our word guaranty or warranty." See Story on Agency, 7th ed., pp. 30, 31.

(d) See Smith's Mercantile Law, 10th ed. pp. 128, 569, and the cases there cited.

(e) See *Morris v. Cleasby*, 4 M. & S. at p. 574. (f) 4 M. & S. 566, 574.

(g) See Throop on the Validity of Verbal Agreements, p. 660; Smith's L. C., 6th American edition, vol. i., p. 489.

RULE IV.
Ante, p. 144.

American
case of Wolff
v. Koppel.

Judgment of
 Justice
Cowen in
Wolff v.
Koppel.

subject is contained in the judgment of the court delivered by *Cowen*, J., in the *American* case of *Wolff v. Koppel* (a). The judgment is in itself a very instructive one, and its reasoning was afterwards adopted by the English courts in the case of *Couturier v. Hastie* (b). It will be well, therefore, to give it at length.

In this case of *Wolff v. Koppel* (a), Justice *Cowen* spoke as follows:—"It is objected that the contract of a factor, binding him in the terms implied by a *del credere* commission, is within the Statute of Frauds, and should, therefore, be in writing. Such is the opinion expressed by Theobald (c), and in *Chitty on Contracts* (d). The question was also mooted in *Gall v. Comber* (e), but not decided, as seems to be implied in the careless manner in which the case is quoted by *Chitty* (f). All the authority presented by the argument grows out of the nature of the contract, as held by the King's Bench in *Morris v. Cleasby* (g). That case certainly defines the liability of the factor somewhat differently from what several previous cases seem to have done. The effect of acting under the commission is said to be, that the factor becomes a guarantor of the debts which are created; that is to say, they are debts due to the merchant, and the factor's engagement is secondary and collateral, depending on the fault of the debtors, who must first be sought out and called upon by the merchant (h). On this we have the opinion of learned writers, that if the agreement *del credere* be

(a) 5 Hill, New York Rep. 458.

(b) 8 Exch. 40; *S. C.*, 9 Exch. 102; *S. C.*, 5 H. L. 673.

(c) *Principal and Surety*, 64, 65.

(d) Page 209, 10th *American* edition of 1842.

(e) 7 Taunt. 279; 1 Moor. 279.

(f) *S. C.* 7 Taunt. 558.

(g) 4 M. & S. 566, 574, 575.

(h) See also *Hornby v. Lacy*, 6 Man. & Selw. 166, 171, 172; *Peele v. Northcote*, 7 Taunt. 478, 484; 1 Moor. 178; *Levrick v. Meigs*, 1 Cowen, 645, 664.

made without writing, the case comes within the statute. On the other hand, approved writers assert that this is not so (*i*). It is true these latter go on the more stringent obligation supposed by Lord *Mansfield*; that of a principal debtor on the part of the factor, the accessorial obligation lying rather on the purchaser. This view of the matter was no longer correct, after the cases I have mentioned were decided. The consequence sought to be derived, however, by writers is merely speculative, and the contrary has lately been directly held by the Supreme Court of Massachusetts, in *Swan v. Nesmith* (*k*). It is said, this was without the court being aware of *Morris v. Cleasby*. Be that as it may, they seem to have been fully aware of the rule laid down in that case, and to have recognised it as correct. They considered the obligation as a guaranty. But a guaranty, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty, in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time; and, in order to charge him, negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales except to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the *onus* of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This

RULE IV.
Ante, p. 144.

(*i*) 1 Beawes. 46, 6th Lond. ed.; 3 Chit. Commercial Law, 220, 221.

(*k*) 7 Pick, 220.

RULE IV.
Ante, p. 144.

debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his failing to secure it through another—some future vendee, to whom the merchant is first to resort. Upon non-payment by the vendee, the debt falls absolutely on the factor. As remarked by *Parker, C.J.*, in *Swan v. Nesmith*, the form of the action does not seem to be material in such a case, that is to say, whether the merchant sue for goods sold, or, on the special agreement. The latter is perhaps the settled form; but still the action is, in effect, to recover the factor's own debt. In the later case of *Johnson v. Gilbert (a)*, the defendant, in consideration of money paid for him by the plaintiff assigned a chattel note and guaranteed its payment. In such a case the declaration must be on a guaranty to pay the debt of another; but this is so in form merely. We held that the contract was to pay the defendant's own debt; that it was not a contract to pay as the surety of another. All such contracts, and many others, are, in form, to pay the debt of another, and so, literally, within the statute, but without its intent. A promise by A. to B., that the former will pay a debt due from the latter, is not within the meaning, though it is within the words (b). So are a numerous class of cases where the promise is made in consideration of the creditor relinquishing some lien, fund or security (c). The merchant gives up his goods to be sold, and pays a premium. Is not this, in truth, as much and more than many of those cases require which go on the relinquishment of a security? Suppose a factor agrees, by parol, to sell for cash, but gives a credit. His promise is, virtually, that he will pay the amount of the debt he thus makes. Yet, who would say his promise is within the statute? The amount

(a) 4 Hill. 178.

(b) *Conkey v. Hopkins*, 17 John. 113; *Eastwood v. Kenyon*, 11 A. & E. 438.

(c) *Theobald's Principal and Surety*, 45, and the cases there cited.

of the argument for the defendant would seem to be, that an agent for making sales, or, indeed, a collecting agent, cannot, by parol, undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes incidently, as a measure of damages."

RULE IV.
Ante, p. 144.
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Coming to the reasons which have been given by *English* judges and text writers, in Selwyn's *Nisi Prius* (d), we find the following words:—

Reasons assigned by English judges and text writers for holding that promise of *del credere* agent not within statute.

"On the same principle as that on which the class of cases, commencing with *Williams v. Leper* (e), may be explained, as before suggested, viz., that the principal object of the transaction is to be regarded; it has been held, that a retainer, of an agent to dispose of goods, under a *del credere* commission, need not be accepted in writing by the agent."

The case of *Couturier v. Hastie* (f) was the first in which it was ever actually held in *England*, that the contract of a factor, acting under the terms of a *del credere* commission, is not within the Statute of Frauds. And the reason given by the Court of Exchequer, in their judgment in this case, is because the *main* object of the agreement between such an agent and his principal is, not the payment of the debt of another, but the taking greater care by the agent in finding purchasers for the goods of his principal. Baron Parke, who delivered the judgment of the court, said:—"The other and only remaining point is, whether the defendants are responsible, by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We

Couturier v. Hastie.

(d) 13th ed., vol. ii., p. 776. (e) 3 Burr. 1886; *S. C.*, 2 Wils. 308.

(f) 8 Exch. 40, 55, reversed on appeal to Exch. Ch. (see *Hastie v. Couturier*, 9 Exch. 102), but affirmed in the H. L. (see *Couturier v. Hastie*, 5 H. L. 673).

RULE IV.
Ante, p. 144.

think they are. Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable, without a note in writing, signed by them; but, being the agents to negotiate the sale, the commission is paid, in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the *main object* of the reward being given to them; and, though it may terminate in a liability to pay the debt of another, that is not the *immediate object* for which the consideration is given; and the case resembles, in this respect, those of *Williams v. Leper* (a) and *Castling v. Aubert* (b). We entirely adopt the reasoning of an *American* judge (Mr. Justice Cowen) in a very able judgment, on this point, in *Wolff v. Koppel*" (c).

Wickham v.
Wickham.

And, subsequently, in the case of *Wickham v. Wickham* (d), *Wood*, V.-C., made the following observations on *Couturier v. Hastie*:—"If the engagement entered into by the firm of *John Finch & Sons* was a contract for a *del credere* agency, then, on the other hand I concur with what was urged on the part of the plaintiffs, that the case of *Couturier v. Hastie* seems to establish that it would not operate as a guarantee, and would not be a promise to answer for the debt of another within the 4th section of the Statute of Frauds. When I look at the whole of that case and consider the

(a) 3 Burr. 1886; 2 Wils. 308.

(b) 2 East, 325.

(c) This case is reported in 5 Hill, New York Rep. 458, and see note (c) to *Couturier v. Hastie*, p. 56 of 8 Exch.

(d) 2 K. & J. 478, 486, 487.

reasons given by the judges in delivering their judgments, though given very cautiously and guardedly, I cannot but conclude that they considered that an agent entering into a contract in the nature of a *del credere* agency, entered in effect into a new substantial agreement with the person whose agency he undertook; that the agreement so entered into by him was not a simple guarantee, but a distinct and positive undertaking on his part on which he would become primary liable: otherwise I cannot see how the learned judges could arrive at the conclusion that the undertaking was not within the Statute of Frauds. Certainly the opinion of the American judge, which one of the learned judges referred to with approbation in delivering judgment in *Couturier v. Hastie*, goes to the full extent which I have described." Again in *Fleet v. Murton* (e), Blackburn, J., agreed with the view expressed by Parke, B., in *Couturier v. Hastie* (f), as to the nature of the promise of a *del credere* agent, namely, that it is neither a guaranteeing nor a contract for sale, and that consequently the Statute of Frauds is out of the question.

RULE IV.
Ante, p. 144.

In the very recent case of *Sutton & Co. v. Grey* (g), the principle of *Couturier v. Hastie* (f) was approved of and applied to the following facts. The plaintiffs, who were stockbrokers, entered into an oral agreement with the defendant that he should introduce clients to them and that the plaintiffs should transact business on the Stock Exchange for the clients thus introduced upon the terms that, as between the plaintiffs and the defendant, the defendant should receive half the commission earned by the plaintiffs in respect of any transactions by them for any clients introduced by the defendant, and that he should pay to the plaintiffs half of any loss which might be incurred by them in respect of such transactions. The plaintiffs claimed to recover

(e) L. R. 7. Q. B. 126, 132. (f) *supra*. (g) (1894) 1 Q. B. 285, C. A.

RULE IV.
Ante, p. 144.

from the defendant half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of a client who had been introduced to them by the defendant. It was held, that, the defendant having an interest in the transactions equally with the plaintiffs *and the main object of the contract being to regulate the terms of the defendant's employment*, the principle of *Couturier v. Hastie* applied, and the contract was not within s. 4 of the Statute of Frauds, and the action was maintainable though the contract was not in writing.

RULE V.

The agreement between promiser and creditor must not amount to a sale by latter to former of debt or security for debt.

RULE V.—*The agreement between the promiser and the creditor, to whom the promise is made, must not amount to a sale by the latter to the former of a security for a debt, or of the debt itself.*

It sometimes happens that a promise to pay the debt of another is made in consideration of the delivery up of a security for such debt, or of the assignment of the debt itself. When this is the case, and the transaction really amounts to nothing more than a sale or transfer of a security or of a debt itself, the 4th section of the Statute of Frauds would appear to have no application. It seems that for the existence of this rule there are only *two direct* authorities, namely, *Castling v. Aubert* (a), and *Anstey v. Marden* (b). Several other cases are, however, *said* to have been decided on this ground (c). In the following cases which are cited as illustrations of the present rule, it will be noticed *firstly*, that in *some* only of the cases the agreement had the effect of *extinguishing* the liability of the original debtor; and *secondly*, that sometimes the price

(a) 2 East, 325.

(b) 1 B. & P. N. R. 86. See also observations of COCKBURN, C.J., in *Fitzgerald v. Dressler*, 7 C. B. (N.S.) 374.

(c) See Throop on the Validity of Verbal Agreements, p. 573, note (f); p. 576, note (j); p. 579, note (m); p. 615, note (d); p. 638, note (y).

of the sale was the *actual debt* of a third person, sometimes a portion only of such debt. RULE V.
Ante, p. 156.

In *Castling v. Aubert* (d), the plaintiff, an agent, had a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances. The defendant induced the agent to waive his lien and give up to him (the defendant) the policies, by promising to provide for the acceptances as they became due. The court held this promise not to be within the 4th section of the Statute of Frauds, and Lord *Ellenborough*, C.J., in giving judgment, said: "It is rather, therefore, a *purchase* of the securities which the plaintiff held in his hands. This is quite beside the mischief provided against by the statute." And *Lawrence*, J., in the same case said: "This is to be considered as a *purchase* by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay if the plaintiff would furnish him with the means of doing so."

In *Love's case* (e) the defendant, a stranger, verbally promised to pay a third party's debt, in consideration of the sheriff's officer restoring goods which he had taken in execution on a *fi. fa.* It was held, that the transaction amounted to no more than a *sale* of the goods taken in execution. The Statute of Frauds does not, however, appear to have been taken notice of in this decision. Love's case.

In *Anstey v. Marden* (f), A. being insolvent, a verbal agreement was entered into between several of his creditors and B., whereby B. agreed to pay the creditors 10s. in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to B. It was held that this agreement was not within the Statute of Frauds, not being a collateral promise to Anstey v.
Marden.

(d) 2 East, 325.

(e) Salk. 28.

(f) 1 B. & P. N. R. 124.

RULE V.
Ante, p. 156.

Houlditch v.
Milne.

answer for the debt of another, but an original contract to *purchase* the debt. In this case *Mansfield*, C.J., seems to rest his decision partly on the circumstance that the promise of B. was to pay only 10s. in the pound, and not the *whole* debt due from A. It is submitted, however, that if A. was liable in the first instance for the 10s. this circumstance could make no material difference in the character of the transaction in question (a). Another case which seems to be also an example of the rule under consideration is that of *Houlditch v. Milne* (b). In that case, which has been before cited on another point, the action was in assumpsit for the repair of a carriage. The following facts seem to have been proved at the trial. The defendant sent certain carriages, the property of one Mr. *Copey*, to be repaired. The defendant applied to the plaintiff to have the carriages sent on board ship, whereupon the plaintiff asked who was he to look to for payment of the repairs. The defendant answered that he had sent them, and that he would pay for them. In consequence of this statement the carriages were sent on board ship, and the bill made out and delivered to the defendant. The defendant declared that the bill was very high, but promised to settle it in a few days. As he did not do so, the plaintiff's attorney called on the defendant, when the defendant said he was told the bill was a most exorbitant one, and a fit subject to refer. The defendant, however, also said that he had the money to pay it, but did not say whether the money was *his own* or Mr. *Copey's*. Lord

(a) It appears, however, as already explained, that the agreement in question discharged A. from all liability, and, therefore, for this reason *alone*, the statute could not apply, see *ante*, pp. 74, 103. In *Chater v. Becket*, 7 T. R. 201 (cited *ante*, pp. 72, 87), the original debtor remained liable; and though the facts were somewhat similar to those in *Anstey v. Marden*, yet the transaction could not have been sustained on the ground of a *purchase* or *sale* of a debt.

(b) 3 Esp. 86, cited *ante*, p. 77.

Eldon, in giving judgment, said: "He was not disposed to nonsuit the plaintiff. In general cases, to make a person liable for goods delivered to another, there must be either an original undertaking by him, so that the credit was given solely to him: or there must be a note in writing. There might, however, be cases where this rule did not apply. If a person got goods into his possession on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary—it appeared to apply precisely to the present case. The plaintiffs had, to a certain extent, a lien upon the carriages *which they parted with on the defendant's promise to pay*: that, he thought, took the case out of the statute, and made the defendant liable for the amount of the bill." Now it is submitted that this case might have been, and probably was, decided on similar grounds to those on which the decisions in *Castling v. Aubert* and *Love's Case* appear to rest (c). Another case, which is also an instance of the rule now under consideration, is that of *Barrell v. Trussell* (d), in which the following were the facts:—

RULE V.
Ante, p. 156.

Barrell v.
Trussell.

J. A. made a good bill of sale of goods to the plaintiff, to secure a debt of 122*l.* 19*s.* due from him to the plaintiff. The plaintiff being about to sell the goods in satisfaction of the debt, the defendant undertook to pay the plaintiff the 122*l.* 19*s.* if he would forbear to sell. *Mansfield*, C.J., held this not to be a transaction within the Statute of Frauds. He said, "What is this but the case of a man who having the absolute uncontrolled power of selling goods refrains upon the request of another?"

From the report of this case, it appears that the

(c) See, however, *ante*, p. 77, where it is shown that there was apparently another ground for this decision.

(d) 4 Taunt. 117.

RULE V.
Ante, p. 156.

plaintiff, by virtue of the bill of sale, was absolute owner of the goods in question. Consequently the defendant's promise was nothing more than an original one to *buy* the said goods, fixing the price at the amount of a third person's debt, which, under the circumstances, was a fair and convenient measure of the price.

Other cases
 seemingly
 referable
 to this
 Rule (V.).

The cases of *Williams v. Leper* (a), *Edwards v. Kelly* (b), and *Bampton v. Paulin* (c), where, in consideration of the delivery up of goods actually taken, or about to be taken, in distress for rent due from a third person, the defendant promised to pay such rent, would seem to be nothing more than purchases, and *might*, therefore, have been exempted from the operation of the Statute of Frauds on that ground; and possibly some of them *were* exempted partly on that ground; though, as already pointed out, there were certainly other more prominent reasons for holding the statute to be inapplicable to those cases.

Thomas v.
Williams.

The case of *Thomas v. Williams* (d) indeed, where the defendant promised to pay rent *due* and to *become* due from a third person, in consideration of the plaintiff forbearing to distrain certain goods for the rent then due, is certainly, as pointed out by Mr. Throop, in his work on the Validity of Verbal Agreements (e), at war with the theory, that where the goods are given up to the promiser the transaction amounts to a purchase, and is, therefore, not within the 4th section of the Statute of Frauds. For, in *Thomas v. Williams*, the statute was held to apply, *because* the promise was not merely in consideration of rent *then due*, but also in consideration of rent to *become* due. But, as Mr. Throop rightly observes, if this was indeed a purchase, it would be immaterial what price the defendant agreed to pay. Moreover,

(a) Burr. 1886; S. C., 2 Wils. 308.

(b) 6 M. & S. 204.

(c) 4 Bing. 264.

(d) 10 B. & C. 664.

(e) Page 576, note (j).

from the case of *Clancy v. Piggott* (*f*), it would seem ^{RULE V.} that in no case can the transaction be treated in the ^{*Ante*, p. 156.} light of a purchase, where the goods liable to distress ^{*Clancy v.*} are, on the defendant's promise to pay what is due ^{*Piggott.*} from the third party, given up to such third party, and not to the principal debtor.

(*f*) 4 Nev. & Mann. 496. See Throop on the Validity of Verbal Agreements, note (*m*), p. 579.

CHAPTER III.

WHAT IS A SUFFICIENT MEMORANDUM IN WRITING TO SATISFY THE REQUIREMENTS OF THE FOURTH SECTION OF THE STATUTE OF FRAUDS.

Statute of
Frauds (s. 4)
requires *the*
agreement to
be in writing.

We have already stated that the 4th section of the Statute of Frauds (a) requires the contract of guarantee to be evidenced by writing, for it provides that the *agreement* upon which the action shall be brought, or *some memorandum or note thereof*, must be *in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized*. It will be observed that the statute requires that "*the agreement*" be in writing. In the celebrated case of *Wain v. Warlters* (b) the guarantee sued upon was written in the following words.

Wain v.
Warlters.

"Messrs. *Wain & Co.*

"I will engage to pay you, by half-past four this day, fifty-six pounds and expenses on bill, that amount on *Hall*.

"*John Warlters.*

"2, *Cornhill*, April 30, 1803."

What the
term
agreement
includes.

This memorandum was held insufficient to satisfy the Statute of Frauds, because only *part* of the agreement appeared in writing, namely, *the promise*, while the 4th section requires "the agreement" to be in writing, and not any *specified part* of it. And it appears that an agreement is not perfect unless in the body of it, or by necessary inference, it contains the names of the

(a) 29 Car. 2. c. 3, *ante*, p. 47.

(b) 5 East, 10; 1 Sm. L. C. 10th ed., p. 310.

two contracting parties, the subject-matter of the contract, the consideration, and the promise (c).

If the legislature had intended that the *promise* only should appear in writing, they would doubtless have employed such language as they have used in the 17th section of the Statute of Frauds, which, instead of providing that "*the agreement*" shall be in writing, requires only "that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized" (d). In *Egerton v. Matthews* (e), it was contended, that there was no substantial difference in language between the 4th and 17th sections of the Statute of Frauds. The court, however, took a different view, and *Lawrence, J.*, in giving judgment, said: "The case of *Wain v. Warlters* proceeded on this, that, in order to charge one man with the debt of another, the *agreement* must be in writing; which word *agreement* we considered as properly including the *consideration* moving to, as well as the *promise* by, the party to be so charged; and that the statute meant to require that the whole agreement, including both, should be in writing" (f).

Respective requirements of 4th and 17th sections of Statute of Frauds as to written evidence contrasted.

For a long time the case of *Wain v. Warlters* was regarded as of doubtful authority (g), and two of the judges (*Lawrence, J.*, and *Le Blanc, J.*) who decided

Rule established by *Wain v. Warlters* and

(c) *Per TINDAL, C.J.*, in *Laythorp v. Bryant*, 2 Bing. N. C. 742. See also Sheppard's Touchstone, p. 85.

(d) The meaning of s. 4 of the Statute of Frauds is substantially the same as that of s. 4 of the Sale of Goods Act, 1893. That is to say: "To satisfy either enactment, the *consideration* for the *agreement* in the one case, and for the *bargain* in the other must . . . appear expressly or impliedly in writing signed by the party to be charged or by his agent." Taylor on Evidence, 9th ed., vol. ii., p. 668, par. 1,021.

(e) 6 East, 307. (f) See *Fitzmaurice v. Bayley*, 9 H. L. Ca. 78.

(g) See *Ex parte Minet*, 14 Ves. 189; *Ex parte Gardom*, 15 Ves. 286; *Phillips v. Bateman*, 16 East, 356; *Goodman v. Chase*, 1 B. & A. 300; 1 Wms. Saund. last ed., p. 226; 1 Sm. L. C., 10th ed., p. 288; Fell on Guarantees, 2nd ed., Appendix IV., p. 262.

Saunders v. Wakefield as to sufficiency of memorandum to satisfy s. 4.

This rule abrogated by 19 & 20 Vict. c. 97, s. 3. Promise of surety need only be in writing, not consideration for it.

This enactment not retrospective. Existence of a consideration still necessary, though it need not be specified in writing.

the case only gave a hesitating assent to the decision. The case was, however, at last confirmed in *Saunders v. Wakefield* (a), and was afterwards acted on in numerous cases (b). The rule that the consideration, as well as the promise, must appear on the face of a guarantee, which was thus laid down, proved a grievance to the mercantile community (c), and was at last rescinded by the third section of the Mercantile Law Amendment Act (d). That section enacts, that "No special promise to be made by any person after the passing of this Act to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written instrument."

This enactment is not retrospective in its operation (e), and it only dispenses with any *written statement* of the consideration, the *existence* of a consideration being quite as necessary as it was before (f). Nor must it be supposed that, in the case of guarantees not under seal, a consideration is *presumed* to exist until the contrary is shown (g), for such presumption is applicable only to bills of exchange and promissory notes (h). Accordingly, in suing upon a guarantee, the consideration for it must be stated, whereas it is never necessary for a

(a) 4 B. & Ald. 505.

(b) 1 Sm. L. C., 10th ed., p. 319, and cases there cited.

(c) 1 Wms. Saund. (last ed.), p. 227.

(d) 19 & 20 Vict. c. 97

(e) Taylor on Evidence, 9th ed., vol. ii., p. 676, par. 1030B, where the wording of the enactment is commented upon.

(f) 1 Sm. L. C. 10th ed., p. 292, and see *Glover v. Halkett*, 2 H. & N. 487.

(g) Fell on Guarantees, 2nd ed., pp. 5, 6.

(h) *Rann v. Hughes*, 7 T. R. 350, note (a); Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30.

plaintiff to aver a consideration for any engagement on a bill or note (*i*). Since the passing of the Mercantile Law Amendment Act, s. 3, though parol evidence may be given to show the consideration for a guarantee, it cannot be admitted to *explain* the promise, which, by the Statute of Frauds, s. 4, must still be complete in writing (*k*). The above enactment does not, says *Byles*, J. (*l*), make a *promise* good which was not good before. Formerly, the consideration expressed *in writing* might be looked at, not only to support, but to explain, the promise. But the *parol* consideration cannot be looked at to explain the promise (*m*). If an instrument of guarantee states a *bad* consideration, it would not be helped by the Mercantile Law Amendment Act (*n*). Moreover, where the parties choose to state in writing the consideration for the promise, they are, it is presumed, bound by such statement, and cannot vary it by parol evidence (*o*). They may, however, show by parol evidence (whether their contract be under seal or not) what is the consideration for the promise, provided it is not inconsistent with the consideration actually expressed (*p*). Thus it is permissible to *add* by parol evidence to the consideration expressed in a written agreement (*q*). If the language of the

The written promise cannot be explained by parol evidence.

If bad consideration set forth in memorandum parties cannot vary it by parol evidence.

(*i*) *Popplewell v. Wilson*, 1 Stra. 264; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 62), s. 30 (1).

(*k*) *Holmes v. Mitchell*, 7 C. B. (N.S.), 361.

(*l*) *Ib.* p. 367.

(*m*) *Per Byles, J., and Williams, J., in Holmes v. Mitchell, supra*, pp. 367, 370; and see *Peek v. N. Staffordshire Ry. Co.*, 10 H. L. Ca. 473; 32 L. J. Q. B. 241.

(*n*) *Per Bramwell, B., in Wood v. Priestner*, L. R. 2 Ex. 66, 282.

(*o*) See 1 Sm. L. C. 10th ed., p. 292, and see Taylor on Evidence, 9th ed., vol. ii., p. 676; *Oldershaw v. King*, 2 H. & N. 399; *S. C., ib.* (Camb. Scacc.), p. 517.

(*p*) *Clifford v. Turrill*, 9 Jur. 633; *Leijchild's Case*, L. R. 1 Eq. 231; *Gale v. Williamson*, 8 M. & W. 405; *In re The Barnstaple Second Annuity Society and Others*, 50 L. T. R. 424; but see Taylor on Evidence, 9th ed., p. 748.

(*q*) *In re The Barnstaple Second Annuity Society and Others, supra.*

Previous decisions as to whether statement of *consideration* a sufficient guide to whether statement of *promise* now sufficient.

guarantee is sufficiently ambiguous, parol evidence is admissible to show that the alleged consideration is sufficient in law (*a*). And, as is stated in a subsequent chapter (*b*), in the construction of guarantees the rule that the construction must be given, *ut res magis valeat*, is applicable. This was decided in the case of *Broom v. Batchelor* (*c*). And in determining whether the *promise* to answer for another's debt, default or miscarriage does appear in writing, regard must be had, not only to those cases in which the courts had to decide whether the statement of the *promise* was sufficient, but also to those analogous cases (occurring *before* 19 & 20 Vict. c. 97, s. 3) in which the question to be decided was whether the statement of the *consideration* was sufficient. Consequently, although it is now no longer necessary that the consideration should appear on the face of the guarantee, the decisions on this point may usefully be referred to. The following are some of the most important of such cases.

Lyon v. Lamb.

In *Lyon v. Lamb* (*d*) *Lyon* had been induced by *Lamb* to give credit to one *Anderton* for divers quantities of raw cotton under what was alleged to be an implied guarantee of *Lamb*. The circumstances were these. The invoices for the goods supplied had been regularly sent by *Lyon* to *Lamb*, and accepted by him, and were in the following form:—"Mr. *John Anderton* guaranteed by *J. Lamb*, bought of *J. Lyon*," etc. *Lamb* had been induced to endeavour to gain credit for *Anderton*, from *Anderton's* sending his manufactured goods to him to sell upon commission. Upon *Anderton's* ceasing to do this, *Lamb* sent back the

(*a*) *Hood v. Grace*, 31 L. J. (N.S.) Exch. 78; *Goldshede v. Swan*, 1 Ex. 154; *Bainbridge v. Wade*, 16 Q. B. 89; *Edwards v. Jevons*, 8 C. B. 436; *Haigh v. Brooks*, 10 Ad. & E. 309; *Colbourn v. Dawson*, 10 C. B. 765; and see *Powell on Evidence*, 6th ed., p. 474.

(*b*) See *post*, Chap. IV.

(*c*) 1 H. & N. 255.

(*d*) *Fell on Guarantees*, 2nd ed., App. No. III.

next invoice, and gave *Lyon* the following note in writing:—

“*Mr. John Lyon.*

“You will receive back your invoice of nine bags left on Wednesday, as *Mr. Anderton* does not now send me his goods to sell. I guarantee all he has bought from you before Tuesday, but I will guarantee no further.”

(Signed, etc.)

It was admitted, both in the argument and in the judgment, that if credit had been given to *Anderton* at the request and upon the verbal guarantee of *Lamb*, that would have been a good consideration for the subsequent promise in writing, and it was further admitted that the invoices might be used to explain the memorandum; however, it was held that such consideration did not sufficiently appear on the face of the memorandum and invoices. Again, in *Stapp v. Stapp* *v. Lill*. *Lill* (e), the memorandum was as follows: “I guarantee the payment of any goods which *Mr. John Strapp* shall deliver to *Mr. Nicholls*, of *Brick Lane*.” It was held, that though, by the agreement, the plaintiff was not obliged to deliver goods, there appeared a sufficient consideration for the defendant’s promise to be answerable if any should be delivered. The court said that this case differed from *Wain v. Warlters* (f), as the agreement contained the thing to be done by the plaintiff, which was the foundation of the defendant’s promise. Very similar to this case is that of *Ex parte Gardom* (g), which came before the Lord Chancellor *Eldon*, upon petition for the admission of the proof of a debt upon the following guarantees, given to the petitioner by the bankrupts:—

“We agree and engage to guarantee for what twist T. T. may purchase from you from etc. to etc.”

(Signed, etc.)

(e) 9 East, 348 (there cited as *Stadt v. Lill*), and 1 Camp. 242.

(f) 5 East, 10.

(g) 15 Ves. 286.

After the expiration of the date there mentioned, the following note of guarantee was given:—

“Whatever cotton twist you may dispose of to T. T., we agree and engage to guarantee the same.” (Dated and signed.)

It was objected to these guarantees, that they did not state any consideration, as between the petitioners and the bankrupts. Lord *Eldon* expressed some difficulty in distinguishing this from the case of *Wain v. Warlters* (a), but added, “My opinion is that this is an agreement, within the meaning of the statute, to pay for the debt of another,” and ordered the proof to be admitted.

*Stead v.
Liddard.*

In *Stead v. Liddard* (b), it was held, in an action on a guarantee, that the reference, by the indorsement, to the terms of the agreement, as forming part of one transaction, was a sufficient memorandum of the consideration within the statute.

*James v.
Williams.*

In *James v. Williams* (c), a letter was written and sent by the defendant to the plaintiff, in the following words: “As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day.” It was held that the consideration, viz., forbearance for six weeks to the principal debtor, could not necessarily or fairly be inferred from the above letter, and that therefore it did not satisfy the Statute of Frauds.

*Newbury v.
Armstrong.*

In *Newbury v. Armstrong* (d), the guarantee was in these words: “I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with, while in your employ, to the amount of 50*l.*” It was held, that the consideration, viz., that the plaintiff should employ J. C., sufficiently appeared.

(a) 5 East, 10.

(b) 8 Moore, 2.

(c) 5 B. & Ad. 1109.

(d) 6 Bing. 201.

In *Jarvis v. Wilkins (e)*, the guarantee was in the following words:—

“Sept. 11th, 1839. I undertake to pay to Mr. *Robert Jarvis* the sum of 6l. 4s. for a suit of ordered by *Daniel Page*.

“*S. W. Wilkins.*”

It was held, that the consideration, which was, that if the plaintiff would sell to *Page* clothes, he (the defendant) would pay for them, could be collected by necessary inference from the above instrument.

In *Caballero v. Slater (f)*, the declaration set out an agreement between *Mary Ann Caballero* (the plaintiff), of the first part, and *David Thompson*, of the second part, signed by the said *David Thompson*, and also by the defendant *Slater*, whereby *Caballero* agreed to let the premises to *Thompson*, at a certain rent, payable quarterly, and which agreement concluded as follows:—

“And Mr. *Michael Thring Slater* does also agree and undertake to see the rent paid quarterly by the said *David Thompson.*”

It was held, on demurrer to this declaration, that a sufficient consideration for the defendant's promise appeared by necessary implication from the instrument set out.

In *Hawes v. Armstrong (g)*, it was held, that, to constitute a valid agreement to answer for the debt or default of a third person, it was not necessary that the consideration should appear in *express terms*: it was sufficient if the memorandum were so framed that a person of ordinary capacity must infer, from the perusal of it, that such, and no other, was the consideration

(e) 7 M. & W. 410.

(f) 14 C. B. 300.

(g) 1 Scott, 661. See also *In re Eyre, McAndrew v. Norris*, 43 W. R. 538; 72 L. T. 588; *Shortrede v. Cheek*, 1 Ad. & E. 57; *Lysaght v. Walker*, 5 Bligh (N.S.) 1; *Emmott v. Kearns*, 5 Bing. N. C. 559; *Kennaway v. Treleavan*, 5 M. & W. 498; *Haigh v. Brooks*, 10 Ad. & E. 309; *Bentham v. Cooper*, 5 M. & W. 621; *James v. Williams*, 5 B. & Ad. 1009; *Powers v. Fowler*, 4 E. & B. 511, 516.

upon which the undertaking was given. In that case the guarantee was as follows:

"Messrs. Haues—Gentlemen, Inclosed I forward you the bills drawn per *J. T. Armstrong* upon and accepted by *Leonard Dell*, which, I doubt not, will meet due honor; but, in default thereof, I will see the same paid. I remain, &c., *B. J. Armstrong, Hatton Wall, 13th May, 1829.*" The consideration, stated in the declaration, was "that the plaintiffs, at the request of the defendant, would give time for the payment of the debt of 260*l.*, then due from *J. T. Armstrong* and *Dell*, and would take, accept and receive, by way of security for the payment of the same, the several bills of exchange set out in the declaration, and would forbear and give time to the said *J. T. Armstrong* and *Dell* for payment of the said debt or sum of 260*l.*, until the said bills should respectively become due and payable." But it was held, that the consideration did not sufficiently appear in the memorandum, and also that no consideration could be *implied* from such a memorandum.

Jenkins v. Reynolds.

In *Jenkins v. Reynolds* (a), the court held that the words "to the amount of 100*l.* be pleased to consider me as security on *Mr. James Cowie & Co.'s* account," did not sufficiently indicate the consideration.

Russell v. Moseley.

In *Russell v. Moseley* (b), the following instrument was held sufficiently to disclose a consideration:—"I hereby guarantee the present account of *H. M.*, and what she may contract from this day to 30th September next."

Where the instrument was so ambiguously worded that the consideration appeared to be made up of two considerations, *one of which was sufficient*, and the other was not, it was held that the instrument was invalid (c).

(a) 3 Brod. & B. 14.

(b) 3 Brod. & B. 211.

(c) *Raikes v. Todd*, 8 A. & E. 846; *Cole v. Dyer*, 9 L. J. Ex. 109; but see *Bainbridge v. Wade*, 16 Q. B. 89; *Steele v. Hoe*, 19 L. J. (N.S.) Q. B. 89.

Where the consideration, expressed in the instrument of guarantee, was that the plaintiff would withdraw "the promissory note," parol evidence was admitted to show what promissory note was meant; for here the parol evidence was only required to identify the subject-matter of a written instrument, and this is always admitted (*d*).

In *Edwards v. Jevons* (*e*), the memorandum to satisfy the statute was in the following words: "In consideration of Messrs. E. R. & Co. giving credit to Mr. D. J., I hereby engage to be responsible to and to pay any sum not exceeding 120*l*. due to Messrs. E. R. & Co. by D. J." The court admitted extrinsic circumstances in evidence, to show that the words "giving credit" were intended to apply to a particular credit agreed upon, and that the guarantee therefore disclosed a good consideration, and was not bad for uncertainty. *Edwards v. Jevons.*

In *Goldshede v. Swan* (*f*), parol evidence was admitted to explain the meaning of the words "you having this day advanced" which appeared in a guarantee, and which may mean, either in consideration that you *have* this day advanced, or in consideration that you *shall* have this day advanced. *Goldshede v. Swan.*

In *Bainbridge v. Wade* (*g*), the court upheld an instrument of guarantee, which, *explained by the circumstances stated in the declaration*, showed a good consideration for the promise of the defendant (*h*). *Bainbridge v. Wade.*

The object of the Statute of Frauds is merely to exclude parol evidence, and to reduce contracts to a

(*d*) *Shortrede v. Cheek*, 1 A. & E. 57. See also *Bateman v. Phillips*, 15 East, 272.

(*e*) 8 C. B. 436; 14 Jur. 131; 19 L. J. C. P. 50.

(*f*) 1 Exch. 154.

(*g*) 16 Q. B. 89.

(*h*) In the following cases, also, the question to be determined was, whether the *consideration* sufficiently appeared on the face of the instrument of guarantee. *Price v. Richardson*, 15 M. & W. 539; *Emmott v. Kearns*, 5 Bing. N. C. 559; *Boehm v. Campbell*, 3 Moo. 15; *Peate v. Dicken*, 1 C. M. & R. 422; *Pace v. Marsh*, 1 Bing. 216; *Tanner v. Moore*, 9 Q. B. 1; *Bushell v. Beavan*, 1 Bing. N. C. 103; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Wain v. Wartters*, 5 East, 10.

certainly, in order to avoid perjury, on the one hand, and fraud on the other. Consequently, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with, in the material part, that is sufficient (*a*). Thus any writing embodying the terms of the agreement, and signed by the person to be charged is sufficient, and the idea of agreement need not be present to the mind of the person signing (*b*). Hence an affidavit, made with quite a different object, may be a sufficient note or memorandum (*c*); or letters written to third parties (*d*); or a letter written long after the contract was made repudiating all liability under it (*e*); or, as was recently held in *In re Hoyle, Hoyle v. Hoyle* (*f*), the recital by a surety in his will of his indebtedness under a verbal guarantee. Where, however, a cheque was drawn by A. & Co., on plaintiffs, and indorsed to latter by the defendant in these terms, namely, "I know this to be a genuine firm," it was held that this indorsement, signed by the defendant, was not sufficient evidence of a promise of guarantee (*g*). Where the contract between a creditor, debtor, and surety is contained in a bill of exchange, in an action by the creditor against the surety on the bill, no other evidence save the bill is required to satisfy the Statute of Frauds if the obligation appearing on the face of the bill is the precise obligation the surety has agreed to undertake (*h*).

(*a*) *Per* Lord Chancellor HARDWICKE, in *Welford v. Beazley*, 3 Atk. 503.

(*b*) *Per* LINDLEY, L.J., in *In re Hoyle, Hoyle v. Hoyle*, (1893) 1 Ch. at p. 98.

(*c*) *Barkworth v. Young*, 4 Drew. 1.

(*d*) *Moore v. Hart*, 1 Vern. 110, 201; *Gibson v. Holland*, L. R. 1 C. P. 1.

(*e*) *Bailey v. Sweeting*, 9 C. B. (N.S.) 843; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Ex. 1, 279.

(*f*) (1893) 1 Ch. 84, C. A.; and see *Millington v. Thompson*, 3 Ir. Ch. Rep. 236.

(*g*) *Ulster Banking Co. v. Mahaffy*, 15 Ir. L. T. 94.

(*h*) *Holmes v. Durkee*, 1 C. & E. 23.

It is necessary, in order to satisfy the Statute of Frauds, that the names of the parties to the contract of guarantee should appear in writing (*i*). Where a written offer contained the names of both contracting parties (though one was only *the agent* of an undisclosed principal), it was held that, on its acceptance, there was a valid contract within the Statute of Frauds (*k*). It seems, however, that the names of the parties to a contract within the Statute of Frauds must appear, *as such*, on the face of the contract, and not merely as descriptive of the subject-matter of the contract (*l*). In order to satisfy the Statute of Frauds, it is not, however, necessary that the memorandum should be addressed to the other contracting party (*m*). Thus, where a guarantee was addressed to the *attorney for the plaintiff*, by the defendant, it was held that the plaintiff was entitled to the benefit of it (*n*).

Names of the contracting parties must appear in writing to satisfy statute.

But the written memorandum need not be addressed to a contracting party.

Moreover, it has been held that a guarantee, not addressed to anybody, will enure for the benefit of those to whom, or for whose use it was delivered (*o*). It has also been held, that a guarantee addressed to one partner will enure for the benefit of all, if there be evidence that this was intended (*p*).

Effect of a guarantee not addressed to any one.

With regard to the signature to a guarantee, it is to

The signature

(*i*) *Williams v. Lake*, 29 L. J. Q. B. 1; *Coombs v. Wilkes*, (1891) 3 Ch. 77. See also *Williams v. Byrnes*, 1 Moo. P. C. (N.S.) 154; and *Champion v. Plummer*, 1 B. & P. N. R. 252.

(*k*) *Filby v. Hounsell*, (1896) 2 Ch. 737.

(*l*) *Vandenberg v. Spooner*, L. R. 1 Ex. 316; 35 L. J. Ex. 201; *Newell v. Radford*, L. R. 3 C. P. 52; *Sarl v. Bourdillon*, 1 C. B. (N.S.) 188; *Coombs v. Wilkes*, *supra*; *Pattle v. Anstruther*, 41 W. R. 625; 69 L. T. 174.

(*m*) *Gibson v. Holland*, L. R. 1 C. P. 1. If, however, the promise is not made to him the Statute of Frauds does not apply. See *ante*, p. 123.

(*n*) *Bateman v. Phillips*, 15 East, 272. See also *Longfellow v. Williams*, 2 Peake, 225.

(*o*) *Walton v. Dodson*, 3 C. & P. 162. See also *Carlill v. Carbolic Smoke Ball Co.*, (1892) 2 Q. B. 484; (1893) 1 Q. B. 256; but see *Williams v. Lake*, 29 L. J. Q. B. 1.

(*p*) *Garrett v. Handley*, 4 B. & C. 664; and *Walton v. Dodson*, *supra*.

of the memorandum.

be observed, that such signature may be either by the "party to be charged" or by his agent. The "party to be charged" *only* need sign (*a*). And, on this principle, a written proposal containing the terms of a proposed contract, signed by the defendant, and *verbally* assented to by the plaintiff, is a sufficient agreement to satisfy the 4th section of the Statute of Frauds (*b*). So, a guarantee signed by the defendant and acted upon by the plaintiff, without any express verbal or written acceptance of it, is sufficient (*c*). Where there is a memorandum in writing of an agreement, containing the name of the party sought to be charged inserted in some part of the memorandum by such party, or his authorized agent, as being a party to the agreement, and such memorandum is presented for signature to the other party, there is a sufficient signature within s. 4 of the Statute of Frauds to bind the party sought to be charged (*d*).

Signature by an agent. His authority to sign need not be in writing. He cannot delegate his authority.

When the signature to a guarantee is not by the principals themselves but by an agent, it is not necessary that any particular formalities should be complied with in the appointment of such agent. Thus, the agent's authority need not be in writing (*e*); and where he is authorized to enter into a binding contract, that of itself gives him implied authority to sign a memorandum thereof to satisfy the 4th section of the Statute of Frauds (*f*). It appears, however, that such agent

(*a*) *Laythorp v. Bryant*, 2 Bing. N. C. 735, 743; 8 Scott, 238; and see 1 Sm. L. C., 10th ed., p. 298.

(*b*) *Smith v. Neale*, 2 C. B. (N.S.) 67.

(*c*) *Liverpool Borough Banking Co. v. Eccles*, 4 H. & N. 139; 28 L. J., Ex. 122.

(*d*) *Evans v. Hoare*, (1892) 1 Q. B. 593.

(*e*) *Emmerson v. Heelis*, 2 Taunt. 38; *Coles v. Trecothick*, 9 Ves. 234, 250; *Mortlock v. Buller*, 10 Ves. 292, 311; *Graham v. Musson*, 7 Scott, 769; *Heard v. Pilley*, L. R. 4 Ch. 548, C. A. See also *Stansfield v. Johnson*, 1 Esp. 101; *Rucker v. Camayer*, cited in Fell on Guarantees, 2nd ed., p. 87; *Cleman v. Cooke*, 1 Sch. & Lef. 22.

(*f*) *Durrell v. Evans*, 10 W. R. 665.

cannot delegate his authority to another, though, if he do so, it would seem that the principal may ratify the act (*g*). The ratification of an agent's authority is only efficacious where the agent originally *professed* to act for the principal, and not where he professed to act for himself or some other person (*h*). There must, moreover, be an actual principal in existence at the time of the making of the contract which is the subject of the ratification (*i*). Again, though subsequent ratification may supply the want of authority in an agent at the time of his acceptance of an offer, it must be shown, in such a case, that there was a contract purporting to be made by and with the agent, which, if the agent had authority, would be a valid binding contract (*k*). Any subsequent recognition of the act of an agent, signing an agreement required by the Statute of Frauds to be in writing, would seem to be sufficient to charge the principal (*l*). And it is not necessary that a person signing a guarantee should expressly sign *as agent*. For the Statute of Frauds does not exclude parol evidence, that a written contract was made by a person as agent only for another (*m*). And where a person, acting under a power of attorney from a firm, signed at the foot of a guarantee their name and his own name also, it was

Ratification
of agent's
signature by
principal.

When agent
signs his own
name and
that of his
principals

(*g*) *Blore v. Sutton*, 3 Mer. 237.

(*h*) *Jones v. Hope and Others*, 3 Times Rep., p. 247; *Wilson v. Tumman*, 6 M. & G. 236; *Saunderson v. Griffiths*, 5 B. & C. 909; *Chitty on Contracts*, 13th ed., p. 264.

(*i*) See *Kelner v. Baxter*, 2 C. & P. 174; *Re The Empress Engineering Co.*, 16 Ch. D. 125, 128; *Melhado v. Porto Alegre Railway Co.*, L. R. 9 C. P. 503.

(*k*) *Mayor, &c., of Oxford v. Crow*, (1893) 3 Ch. 535; *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13; *Athy Guardians v. Murphy*, (1896) 1 Ir. Ch. D. 65.

(*l*) *Gosbell v. Archer*, 2 Ad. & E. 500, 507; and *Maclean v. Dunn*, 4 Bing. 722; *Fitzmaurice v. Bayley*, 6 E. & B. 868; *Chitty on Contracts*, 13th ed., p. 265.

(*m*) *Higgins v. Senior*, 8 M. & N. 834; *Wilson v. Hart*, 7 Taunt. 295; and see *Sims v. Bond*, 5 B. & Ad. 389.

must be taken to have signed as a contracting party.

Agent need not sign the name of his principal.

Agent must have some authority to sign guarantee.

held that evidence of his having intended to sign in his own right, as well as on behalf of the firm, did not contradict the document, and was admissible, and that he must be taken to have signed as a contracting party (*a*). It is not necessary that a person signing an instrument should sign the name of his principal. In such cases, however, the agent cannot defeat an action on the instrument by proving that he signed only as agent for another, for this would, by *discharging* the agent, violate the rule of law, that parol evidence is not admissible to *contradict* a written instrument (*b*). A person, may, however, now allege (as he could formerly also have done by equitable defence) that, though he signed the instrument sued upon in his own name, and without adding that he was agent for another, yet it was agreed between himself and the plaintiff, at the time of the execution of the instrument, that he was not to be liable as principal (*c*). Moreover, though parol evidence is not admissible, *on behalf* of a person who has signed an instrument *as principal*, to show that he is *an agent* merely, yet, it is admissible on behalf of a plaintiff suing the undisclosed principal, for the purpose of *charging* the latter, for this evidence is *consistent* with the instrument (*d*). But the authority of the agent may be countermanded at any time before a memorandum of the contract is written and signed by him pursuant to the Statute of Frauds (*e*).

It is, however, necessary that the agent should have *some* authority to bind the defendant, for if he have not, the principal is not liable. Thus, a memorandum, written by the plaintiff's clerk, in the presence of the

(*a*) *Young v. Schuler*, 11 Q. B. D. 651 ; 49 L. T. 456.

(*b*) *Higgins v. Senior*, 8 M. & N. 834 ; and see 2 Sm. L. C., 10th ed., notes to *Thompson v. Davenport*, *post*, p. 378, *et seq.*

(*c*) *Wake v. Harrop*, 6 H. & N. 768 ; and in error, 1 H. & C. 202.

(*d*) *Wilson v. Hart*, 7 Taunt. 295 ; and remarks on this case at p. 394, 395 of 2 Sm. L. C., 10th ed.

(*e*) *Farmer v. Robinson*, cited in a note, 2 Camp. p. 339.

defendant, that "the latter had called to say that he would be responsible for goods delivered to Mr. H.," was held not to be a sufficient undertaking within the Statute of Frauds (*f*). But, in *Watkins v. Vince* (*g*), it was held by Lord *Ellenborough*, at *Nisi Prius*, that the son of the defendant, aged sixteen years, who was proved to have signed for his father in three or four instances, and to have accepted bills for him, was a sufficient agent to sign a memorandum of guarantee. So where an agent is authorized to enter into a binding contract that gives him implied authority to sign a binding memorandum of the contract (*h*). While, thus, a principal is not bound by the signature of a person who has no authority to sign, on the other hand, liability may personally attach to a person so signing. For a person signing a contract as agent for another, without any authority to do so, exposes himself to legal liability, varying according to the circumstances of *each* particular case. If there was no principal existing at the time who *could* be bound, and the contract would be wholly inoperative, unless binding on the person who signed it, the agent signing it is personally liable upon it (*i*). If, however, there was a person existing at the time who could, (but did not) authorize the agent to sign, and who *could be bound*, the agent will be liable to an action for thus misrepresenting his authority (*k*); unless, indeed, he had once had an authority, the determination of which could not be known to him (*l*). An agent *ignorantly* or *wilfully* misrepresenting his authority, is, it seems, also liable in an action upon his implied

(*f*) *Dixon v. Broomfield*, 2 Chit. 205.

(*g*) 2 Stark. 368.

(*h*) *Durrell v. Evans*, 10 W. R. 665.

(*i*) *Kelner v. Baxter*, L. R. 2 C. P. 174, but see *Jones v. Hope*, 3 T. L. R. 247n.

(*k*) *Thomas v. Edwards*, 2 M. & W. 215; *Lewis v. Nicholson*, 18 Q. B. 503.

(*l*) *Smout v. Ilbery*, 10 M. & W. 1.

promise that he really possessed the authority which he pretended to have (a).

What class of agents possess implied authority to give guarantees.

The question, whether a person has authority to bind another, is thus of great importance, both as regards the liability of the alleged principal, and also with reference to the liability of the person thus signing on another's behalf. It will, therefore, be useful to consider it in detail, and with regard to the various classes of agents which exist. Before doing so, it may be as well to state generally that a contract made by an agent being the contract of the principal, the agent need not be *sui juris*, and hence an infant, a married woman, and indeed *anyone* may be an agent (b).

Brokers.

A *broker*, instructed by one person to buy and by another to sell goods, is equally the agent of both parties (c). If therefore, such broker, doubting the credit of the purchaser, were to take the guarantee of another, reduce a sufficient memorandum thereof into writing, and sign it, it is *conceived* that he would be a sufficient agent for that purpose (d).

Solicitors.

A *solicitor* has no *implied* authority, *as such*, to sign a memorandum of a contract within the 4th section, the draft of which he is instructed to prepare (e).

Auctioneers.

It does not appear ever to have been decided whether an *auctioneer*, instructed to sell some land, and receiving a guarantee for the price, instead of a deposit from the purchaser, could act as agent of the person giving the

(a) *Collen v. Wright*, 8 E. & B. 647; *Simons v. Patchett*, 7 E. & B. 568; *In re National Coffee Palace Co., Ex parte Panmure*, 24 Ch. D. 367, C. A. (where the measure of damages is discussed); *Meek v. Wendt & Co.*, 21 Q. B. D. 126; *Firbank v. Humphreys*, 18 Q. B. D. 54 C. A., 2 Sm. L. C., 10th ed. p. 383, notes to *Thompson v. Davenport*.

(b) *Anson on Contracts*, 6th ed., p. 327; *Blackwood Wright's Law of Principal and Agent*, p. 11.

(c) *Benjamin's Sale of Personal Property*, 4th ed., p. 249, and see *Thompson v. Gardiner*, 1 C. P. D. 777.

(d) *Fell's Law of Mercantile Guarantees*, 2nd ed., p. 89.

(e) *Smith v. Webster*, 3 Ch. D. 49; 24 W. R. 894; 45 L. J. Ch. 528; 35 L. T. 44, and see *Howard v. Braithwaite*, 1 Ves. & B. 202.

guarantee and affix such person's name to it (*f*). It is, however, submitted that generally he could do so, though he is not, it seems, *ex vi termini*, agent for both parties (*g*).

One of the *contracting parties* cannot act as authorized agent for the other contracting party and bind him by his signature, for the agent contemplated by the Statute of Frauds must be a *third person* (*h*). A party to the contract.

It is very difficult to lay down any rules in regard to the power of one *partner* to bind the rest by executing a guarantee in the name of the partnership firm, as the nature of a partner's power or authority to bind his co-partners varies in each case. It is now provided by the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5 that "every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner." This enactment, however, does not afford any assistance in determining whether, in a particular case, the giving of a guarantee is an "*act for carrying on in the usual way*" the business of the firm in whose name it is given. Whether it is so, must, it is submitted, depend Partners.
Right of one partner to bind rest by a guarantee depends on nature of business or previous course of dealing.

(*f*) Fell's Law of Mercantile Guarantees, 2nd ed., p. 94.

(*g*) *Bartlett v. Purnell*, 4 Ad. & E. 792; *Sykes v. Giles*, 5 M. & W. 645.

(*h*) *Farebrother v. Simmons*, 5 B. & Ald. 333; *Wright v. Dannah*, 2 Camp. 203; *Sharman v. Brandt*, 40 L. J. (N.S.) 312; *S. C.*, L. R. 6 Q. B. 720 (which are decisions on the 17th section of the Statute of Frauds, but are equally applicable to the 4th section). See, however, *Bird v. Boulter*, 4 B. & Ad. 443, 447, and see observations in *Blackburn on Contracts of Sale*, 2nd ed., p. 73, 74.

on the nature of the business carried on by the firm, or on the previous course of dealing. It would seem, however, that unless it can be shown that the giving of guarantees is necessary for carrying on the business of the firm in the ordinary way, one of the members will be held to have no *implied* authority to bind the firm by them; for, generally speaking, it is not usual for persons in business to make themselves answerable for the conduct of other people (a). Perhaps the only general rule on the subject that can be laid down, with any degree of safety, is that given by Lord *Mansfield* in

Hope v. Cust. *Hope v. Cust* (b), viz., "that the act of every single partner in the transaction *relating to* the partnership binds all the others. If one give a letter of credit or guarantee in the name of all the partners it binds all."

Ex parte Nolte.

In *Ex parte Nolte* (c), the view taken by Lord *Mansfield* in *Hope v. Cust* was upheld by Lord Chancellor *Eldon*, who decided that a partner may give a guarantee where the obligation has reference to business connected with the partnership, and where the guarantee is notified to the firm, and they do not dissent from it.

Upon the general question as to the power of one partner to bind the firm by giving a guarantee, the

(a) Lindley on Partnership, 6th ed., p. 150. The Partnership Act, 1890 (53 & 54 Vict. c. 39), provides by s. 6 that "an act or instrument relating to the business of the firm and done or executed in the firm's name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm," and, on the other hand, by s. 7 provides that "where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact *specially authorized* by the other partners; but this section does not affect any personal liability incurred by an individual partner."

(b) *Sittings at Guildhall after Michaelmas Term, 1774.* This case is cited by *Lawrence* in *Shirreff v. Wilks and Others*, 1 East, at p. 53.

(c) 2 Glyn & J. 295; and see *In re West of England Bank, Ex parte Booker*, 14 Ch. D. 317.

case of *Sandilands v. Marsh* (d) is worthy of careful consideration. There, one *Creed*, a member of a firm of navy agents, in consideration of the plaintiff employing the firm as his agents to lay out 4,000*l.* in the purchase of an annuity, and of a commission of 5*l.* per cent. to be paid to such agents, guaranteed the punctual half-yearly payment of the annuity to the plaintiff. An action having been brought on this guarantee, the question arose whether *Marsh*, who was the partner of *Creed*, who gave the guarantee in the name of the firm, was bound by it. At the trial the learned judge left it to the jury to say whether under the circumstances of the case *Marsh* was cognizant of the transaction as to the purchase of the annuity though he might be ignorant as to the facts of the guarantee itself, telling them that in that case he thought the defendant was liable. The jury found this fact in the affirmative, and the plaintiff obtained a verdict. Leave to move was given, and a rule *nisi* obtained. In discharging this rule *Abbott*, C.J., said: "Two material questions have been made; the first (e) of which, and the most important and extensive in its consequences, is whether this defendant shall be held to be bound by the guarantee given without his knowledge by his partner *Creed*, and if the verdict of the jury finding him to be so bound be not sustainable, it will be very dangerous hereafter to deal with a partnership; for the business in each department of a firm is generally transacted by one partner only. It has, undoubtedly, been held that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners. In

(d) 2 B. & Ald. 673.

(e) The second question has no bearing on the subject now under discussion.

this case, the proper business of *Marsh* and *Creed* was to receive the money due from the navy board to their customers, and their dividends in the public funds. . . . It was no part of their ordinary business to guarantee annuities or to lay out the moneys of their customers in the purchase of them. Under these circumstances the original proposal was made by *Creed*, in answer to which the joint power of attorney was transmitted to *Marsh* and *Creed*, under which the stock was afterwards sold. Now, that sale must have appeared in the partnership books, and if that fact were doubtful, it is proved by the balance stated in the accounts transmitted by the partnership: that sale, therefore, and the fact that the proceeds had been laid out in the purchase of an annuity, either were actually known, or ought to have been known by *Marsh*. Now, if that whole transaction were known to him, the guarantee which is connected with it becomes, in point of law, an assurance made by one partner with reference to business transacted by both; and, according to the rule previously stated, it will bind both. To illustrate this position, a case may be put where two persons, in partnership for the sale of horses, should agree between themselves never to warrant any horse; yet, though this be their course of business, there is no doubt that if, upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound." In the same case, *Bayley*, J., in his judgment, says: "It is true that one partner cannot bind another out of the regular course of dealing by the firm. But where the assurance has reference to business transacted by the partnership, *although out of the regular course*, it is still within the scope of his authority, and will bind the firm."

Ex parte
Gardom.

In *Ex parte Gardom* (a), *Gardom* being applied to by *Thomas Tapp*, of *Manchester*, to sell him cotton twist,

desired a reference. Accordingly, *Goodwin*, of the house of *Hargreave & Goodwin*, verbally informed *Gardom* that their house would guarantee what twist *Gardom* might sell to *Tapp*, up to the 1st January, 1808, as *Tapp* was manufacturing goods for them. In due course the following engagement was drawn up in writing to be signed by *Hargreave* and *Goodwin*: "We agree and engage to guarantee for what twist *Thomas Tapp* may purchase from you from the 28th ult. to the first of January, 1808. *Hargreave & Goodwin*." That paper was signed by *Goodwin* only. A renewal of the guarantee afterwards took place, in similar terms. Sales took place under both guarantees. A commission of bankruptcy issued against *Tapp*; and another against *Hargreave & Goodwin*. Under that commission *Gardom* offered to prove the residue of his demand upon *Tapp*, but proof was rejected upon three grounds, one of which was, *that the signature of Goodwin alone could not bind the partnership*. This ground, however, was ultimately given up, whereupon Lord Chancellor *Eldon* said: "The objection, that the partnership was not bound by the signature of one partner, is properly given up."

It appears that, in the case of ordinary merchants, one partner has no incidental authority to bind another in the name of the firm, by a guarantee given *out of the course of ordinary business*. This was decided in *Duncan v. Lowndes* (b). There a guarantee was given for the due payment of a bill of exchange to the plaintiff for 670*l.* 15*s.*, accepted by *Dickinson & Co.*, for the price of goods which the plaintiff had sold them. It appeared that the guarantee was signed by the defendant *Lowndes*, who was one of the partners, in the name of the partnership firm. Lord *Ellenborough* held that it was necessary to prove that *Lowndes* had authority from his co-partner to execute the guarantee in the name of the partnership firm, as it was not usual

One member of an ordinary mercantile firm has no implied power to bind the rest.
Duncan v. Lowndes.

for merchants, in the common course of business, to give collateral engagements of the sort in question. "It is not incidental to the general power of a partner to bind his co-partners by such an instrument." It was also held, that proof of a subsequent recognition of the guarantee by the partner who did not actually sign it, as well as a prior command or proof of a previous course of dealing in which such guarantees were given, and to which all the partners were privy, would be sufficient evidence of an authority to execute the guarantee in the name of the partnership firm (a).

*Crawford v.
Stirling.*

So, in *Crawford v. Stirling* (b), *Crawford & Co.*, the plaintiffs, were manufacturers and merchants at *Glasgow*, in *Scotland*; but *Andrew Mitchell*, one of the partners, resided in *London*, and conducted the business of the house there. One *Kirkpatrick*, who lived in *Liverpool*, having occasion for goods in the course of his trade in which the defendant dealt, procured the guarantee of *Mitchell* to the defendant, on account of the house of the plaintiffs, for which the house received an allowance of $2\frac{1}{2}$ per cent. There was evidence of adoption of the guarantee by the firm of *Crawford & Co.* It was held, that this guarantee bound the entire firm. Lord *Ellenborough* said: "A guarantee given by one partner in the partnership's name, unless it was in the regular line of business, could not bind the other partners; but if they afterwards adopted it, and acted on it, it should bind them."

*Brettell v.
Williams.*

In *Brettell v. Williams* (c), the defendants, who were in partnership as railway contractors, contracted with a railway company to do certain works. U. & R. made a sub-contract with the defendants to do part of the work, and, for that purpose requiring coals to make bricks,

(a) See as to what is a sufficient recognition of the acts of a partner, so as to bind the co-partners, *Thomas v. Atherton*, 10 Ch. D. 185, C.A.; *Cleather v. Twisden*, 28 Ch. D. 340, C.A.

(b) 4 Esp. 207.

(c) 4 Exch. 628.

one of the defendants, without the knowledge or assent of his co-partners, signed in the name of the firm, and delivered to the plaintiffs a guarantee, not addressed to any person, for payment of coals to be supplied to U. & R. It was *held*, that the guarantee did not bind the firm of railway contractors, there being no evidence that it was necessary for carrying into effect the partnership contract, or that the other partners had adopted it. Baron *Parke*, in his judgment in the case, ably reviews the authorities on the subject we are dealing with. He says: "That one of two partners engaged in business as merchants had not, by reason of that connection alone, power to bind the other by a guarantee, apparently unconnected with the partnership trade, was decided by Lord *Ellenborough*, in the case of *Duncan v. Lowndes* (*d*); and the court of Queen's Bench gave a similar decision in that of *Hasleham v. Young* (*e*), where the defendants were in partnership as attorneys. No proof was given in either of these cases of the previous course of dealing or practice of the partners, which, it is admitted in both cases, might be sufficient to prove a mutual authority; nor was any evidence given of the usage of similar partnerships to give such guarantees; nor was there any of a recognition and adoption by the other partners which would have the same effect. The case of *Sandilands v. Marsh* (*f*) proceeded on the latter ground. In the present case, no evidence was given to show the usages of the defendants in this particular business, or of others in a similar business; nor was there any evidence of the sanction by the other defendants of the act of their co-partner; for a witness who was called to prove the latter fact, would not, on cross-examination, swear that he was authorized by them to write a letter, which, if proved to have been so written, would have been sufficient. Simply as railway contractors they could not have any such

(*d*) 3 Camp. 477. (*e*) 5 Q. B. 836. (*f*) 2 B & Ald. 673, *ante*, p. 181.

power. The only question then is, whether they had it in this particular case, in consequence of its being a *reasonable* mode of carrying into effect an acknowledged partnership contract. One partner does communicate to the other, simply by the creation of that relation, and as incident thereto, all the authority necessary to carry on their partnership in its ordinary course (*a*), and all such authority as is usually exercised by partners in the same sort of trade, but no more. To allow one partner to bind another by contracts out of the apparent scope of the partnership dealings, because they were reasonable acts towards effecting the partnership purposes, would be attended with great danger. Could one of the defendants in this case have bound the others by a contract to lease or buy lands, or a coal mine, though it might be a reasonable mode of effecting a legitimate object of the partnership business? Our opinion is, that one partner cannot bind the others in such a case, simply by virtue of the partnership relation. In the case of *Ex parte Gardom* (*b*), this point was not fully discussed, but given up by Sir *S. Romilly*, who had two other objections to the guarantee, on which he could rely, and on one of which he succeeded. Besides, we are not sufficiently informed by the report whether there might not have been some peculiar circumstances in the case which caused the abandonment of that point. We do not think that is an authority sufficient to establish the doctrine now contended for."

Hasleham v.
Young.

Similar doctrines are applied in the case of other business, such as solicitors. Thus, in *Hasleham v. Young* (*c*), one of two attorneys in partnership, in order to procure the release of a client from custody, gave an undertaking in the name of the firm, to pay the debt and costs on a day named, and it was held that the firm was not liable. It did not appear that the guarantee

(*a*) See *Hawtaine v. Bourne*, 7 M. & W. 595.

(*b*) 16 Ves. 286. See this case, *ante*, pp. 167, 168. (*c*) 5 Q. B. 836.

was any advantage to the firm, there was no evidence that the guarantee was given in pursuance of the ordinary practice of the parties, and, as *Patteson, J.*, said, "Certainly such a transaction is not in the usual course of the business of attorneys."

In *Payne v. Ives (d) Abbot, C.J.*, left it to the jury to say whether a guarantee had been given with the privity and consent of all the partners. There *Mann*, of the firm of *Ives, Sargon, and Mann*, gave a guarantee in his own handwriting, and signed by him only, on the part of the firm, to Messrs. *Payne & Co.*, whereby Messrs. *Ives, Sargon, and Mann* undertook to indorse any bill or bills which one *John Stubbs* might give to Messrs. *Payne & Co.*, in part payment of an order for certain goods then being executed for him.

Where the guarantee is *several* as well as *joint*, it will in any case bind such of the partners as sign it (*e*). Joint and several guarantee binding on partners who sign it if not on firm.

As regards the power of one or more in a partnership to bind the whole firm by a guarantee *under seal*, there can be no doubt that the rule laid down by Lord *Kenyon, C.J.*, in *Harrison v. Jackson (f)*, would apply to such a case, namely, that a "general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a *particular power* be given for that purpose." Power of one partner to bind the rest by guarantee under seal.
Harrison v. Jackson.

It seems, moreover, to be doubtful whether the subsequent acknowledgment of the partner or partners, who did not execute the deed, that it was executed with their authority, is sufficient to make the instrument Effect of subsequent acknowledgment by firm of signature of guarantee

(*d*) 3 D. & R. 664.

(*e*) *Ex parte Harding, in re Smith, Fleming & Co.*, 12 Ch. D. 557. By s. 7 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm, incurred while he is a partner.

(*f*) 7 T. R. 207; and see *Clinan v. Cooke*, 1 Sch. & Lef. 22.

under seal by
member of
firm.

binding upon them (a). "However, though one partner has no *implied* authority generally to bind his co-partner by deed, yet, if one partner execute a deed on behalf of the firm, in the presence and with the consent of his co-partners, that will bind the firm; *in such case the sealing and delivery by one is deemed to be the act of all*" (b).

Seem
guarantee
only binds
existing
members of
firm, not
subsequent
members.

It seems that a guarantee given by a partnership firm does not bind persons who subsequently become members of the firm (c). For though it may be contended that by entering a firm a man *ipso facto* ratifies what his now partners did before he joined them (d), it must not, on the other hand, be forgotten that ratification can only be of an act done for and on behalf of the person ratifying (e).

Liability of
apparent
partners.

A person who is only an *apparent* partner may yet be liable equally with the firm for acts done on its behalf. On this subject the Partnership Act, 1890 (53 & 54 Vict. c. 39), now provides as follows :

Section 14.—(1) "Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner

(a) Collyer on Partnership, 2nd ed., p. 309; *Steiglitz v. Eggington*, Holt, N. P. C. 141; *Brutton v. Burton*, 1 Chit. 707; but see *Harvey v. Kay*, 9 B. & C. 356; *Sandilands v. Marsh*, 2 B. & A. 673.

(b) Collyer on Partnership, 2nd ed., pp. 309, 310; *Ball v. Dunsterville*, 4 T. R. 313; *Burn v. Burn*, 3 Ves. 573; *Smith v. Winter*, 4 M. & W. 454.

(c) Fell's Law of Mercantile Guarantees, 2nd ed., pp. 120, 121; Lindley on Partnership, 6th ed., p. 215.

(d) *Horsley v. Bell*, 1 Bro. C. C. 101, note, *per* GOULD, J.

(e) *Wilson v. Tumman*, 6 M. & G. 236; and see *Young v. Hunter*, 4 Taunt. 582; *Ex parte Jackson*, 1 Ves. Jun. 131. As to liability of a retired partner as surety, see *Rouse v. Bradford Banking Co.* (1894) 2 Ch. 32; and see this case, *post*, p. 317.

making the representation or suffering it to be made.

(2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death."

As regards the liability of a *company*, on a guarantee given by its *directors*, it appears that the company is not bound, in the absence of proof that the directors had power to give it (*f*). Moreover, a contract which is *ultra vires* cannot be rendered binding on the company, though afterwards expressly assented to by the shareholders at a general meeting; for, being in its inception void, it cannot be ratified even by the assent of the whole body of shareholders (*g*). The law is the same whether the company was created under the Companies Act, 1862 (25 & 26 Vict. c. 89) or by any other statute (*h*). The *directors* of a company may, however, become sureties for it, and they then possess the rights and incur the responsibilities attaching to the ordinary contract of suretyship (*i*). And where directors guarantee the performance by a company of a contract which is *ultra vires*, and cannot therefore be enforced against the company, the directors are nevertheless liable under their guarantee (*k*). Where

Liability of
a company
on guarantee
given by
directors.

(*f*) *In re Era Life Assurance Society*, 1 W. N. 309. See also *Ridley v. Plymouth Grinding Co.*, 2 Ex. 711; *Kirk v. Bell*, 16 Q. B. 29a; *Smith v. Hull Glass Co.*, 11 C. B. 926, 927.

(*g*) *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653; per BRETT, L.J., in *In re Coltman, Coltman v. Coltman*, 19 Ch. D. at p. 71; but see *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *London Financial Association v. Kelk*, 26 Ch. D. 107.

(*h*) *Baroness Wenlock v. River Dee Co.*, 10 App. Cas. 354.

(*i*) *Gray v. Seckham*, L. R. 7 Ch. App. 680; and see *In re Booth Browning v. Baldwin*, 27 W. R. 644; *Dallas v. Walls*, 29 L. T. R. 599; *Macdonald v. Whitfield*, 8 App. Cas. 733.

(*k*) *Yorkshire Railway Wagon Co. v. Maclure*, 19 Ch. D. 478; *Chambers v. Manchester & Milford Railway Co.*, 5 B. & S. 588, 612.

directors are sureties for an unlimited company which is being wound up, they cannot set off payments made by them, after the winding-up order, in discharge of their suretyship liability, against calls made before the filing of the petition and enforced by a subsequent order but not yet paid (*a*).

The position of the signature to memorandum of guarantee.

As regards the *position* of the signature of the party to be charged to a written memorandum required by the Statute of Frauds, it appears that, provided the name be inserted in an instrument in such a manner as to have the effect of *authenticating* it, the requisition of the Act with respect to signature is complied with, and it does not matter *in what part* of the instrument the name is found (*b*). Thus it may be at the head, the middle, at the end, or in any part of the document (*c*). A mere casual introduction of the name would not, however, amount to a sufficient signature (*d*). When, however, the memorandum of agreement took the form of a letter from the plaintiff, addressed to the defendants, *whose name appeared at the beginning of the letter*, it was held that as the defendant's name was inserted in the letter by their authorized agent, who also wrote the letter with their authority, there was a sufficient signature to satisfy the 4th section of the Statute of Frauds (*e*).

Where the party to be charged has not signed the instrument in the *usual* place, the question is always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he

(*a*) *In re Norwich Equitable Fire Assurance Co., Brasnet's Case*, 33 W. R. 1010.

(*b*) *Ogilvie v. Foljambe*, 3 Mer. 53; *Caton v. Caton*, L. R. 2 H. L. 127. See also *Lobb v. Stanley*, 5 Q. B. 574; *Simmonds v. Humble*, 13 C. B. (N.S.) 258; *Proper v. Parker*, 1 Russ. & My. 625.

(*c*) 1 Sm. L. C., 10th ed., p. 319; *Durrell v. Evans*, 1 H. & C. 174.

(*d*) See *Stokes v. Moore*, 1 Cox, Eq. Cas. 219.

(*e*) *Evans v. Hoare*, (1892) 1 Q. B. 593.

refused to complete it (*f*). Where it is obvious that the parties did not intend that the agreement should be perfect till their names were added at the foot, the Statute of Frauds will not be satisfied (*g*).

As regards the *kind* of signature, we may observe that a mark by a *marksman* is a sufficient signature of an agreement in writing within the Statute of Frauds (*h*) and no inquiry should be allowed as to whether the party making a mark could write (*i*). There must, however, be a signing, *i.e.*, an actual signature of the name, or something intended by the writer to be equivalent to a signature; for it is not enough that the party may be *identified*; the statute requires him to sign (*k*). Hence, it would seem that though the hand of the person signing may be guided by another (*l*), the mere tracing over a signature with a dry pen is not sufficient (*m*). It appears that a signature by *initials* is sufficient (*n*), if the initials be intended as a signature by the party who writes them (*o*). However, the *christian* name may be set out at length, denoted by initials, or left out altogether (*p*). A printed signature

The *kind* of signature to memorandum of guarantee.

Initials sufficient.

Printed signature sufficient.

(*f*) *Per* Lord ABINGER, C.B., in *Johnson v. Dodgson*, 2 M. & W. 653, 659; *Evans v. Hoare*, (1892) 1 Q. B. 593. See also *Knight v. Crockford*, 1 Esp. 190, 193, and *Saunderson v. Jackson*, 2 B. & P. 238, 239.

(*g*) *Hubert v. Treherne*, 3 M. & G. 743; and see *Caton v. Caton*, *supra*.

(*h*) *Selby v. Selby*, 3 Mer. 2. See also *Hubert v. Moreau*, 12 Moore, 216, 219; *Baker v. Dening*, 8 A. & E. 94; 1 Sm. L. C., 10th ed., p. 322.

(*i*) *Baker v. Dening*, *supra*.

(*k*) *Ibid*.

(*l*) *Helsham v. Langley*, 11 L. J. Ch. 17.

(*m*) *In Goods of Maddock*, L. R. 3 P. & D. 169; *In re Goods of Cunningham*, 29 L. J. Prob. 71.

(*n*) 1 Sm. L. C., 10th ed., p. 319; *In the Goods of Blewitt*, 5 P. D. 116; *Dyas v. Stafford*, 7 L. R. Ir. 590; *Chichester v. Cobb*, 14 L. T. (N.S.) 433; *Gobrie v. Woodley*, 17 Ir. C. L. R. 221; *Jacob v. Kirk*, 2 Moo. & R. 221; *Sweet v. Lee*, 3 M. & G. 452; *Parker v. Smith*, 1 Coll. 608; *Hubert v. Moreau*, 2 C. & P. 528; and see Benjamin on Sales, 4th ed., p. 232.

(*o*) *Per* Lord WESTBURY, in *Caton v. Caton*, 2 H. L. 127, 143.

(*p*) *Lobb v. Stanley*, 5 Q. B. 574, 581, 582. See 1 Sm. L. C., 10th ed., p. 320, 354.

Signature by
a witness.

Signature by
indorsement
of draft.

Guarantee
drawn up in
plural
number and

would seem to be sufficient. Certainly this is the case where there is subsequent recognition, or where part of the instrument is in the handwriting of the party (*a*). A signature by *pencil* is certainly good (*b*). It seems to be doubtful, having regard to decided cases, whether a signature by a person mentioned in the memorandum as a contracting party, though he profess to sign as a witness, is sufficient (*c*). But it would seem that where the signature is not that of the agent of the party to be charged, *qua* agent, but only in the capacity of witness to the writing, it will not suffice (*d*). The mere altering of a draft is not a sufficient signature, because the party clearly did not intend to be bound thereby (*e*). Where, however, a parol agreement in writing was entered into, and a draft of it was prepared, and, by indorsement on this draft, the defendant admitted the agreement, but excused himself from performing it, it was held that the 4th section of the Statute of Frauds was satisfied (*f*). So where the purchaser's name and address were filled in, at his request, by the auctioneer's clerk, in the memorandum of agreement, it was held that the 4th section of the Statute of Frauds was satisfied (*g*).

A guarantee drawn up in the plural number, and concluding as, "Witness our hands," but signed by one surety only, is binding upon the surety who signed it (*h*).

(*a*) *Schneider v. Norris*, 2 M. & S. 286. See also *Saunderson v. Jackson*, 2 B. & P. 238.

(*b*) Chitty on Contracts, 13th ed., p. 107; *Geary v. Physic*, 5 B. & C. 234.

(*c*) *Welford v. Beechly*, 1 Ves. sen. 6; *Coles v. Trecothick*, 9 Ves. 234, 250; *Blore v. Sutton*, 3 Mer. 237; *Gosbell v. Archer*, 2 Ad. & E. 500.

(*d*) Benjamin on Sales, 4th ed., p. 248.

(*e*) *Hawkins v. Holmes*, 1 P. W. 770.

(*f*) *Shippey v. Denison*, 5 Esp. 190. See also *Barkworth v. Young*, 26 L. J. Ch. 153; *Jackson v. Lowe*, 1 Bing. 9; *Warner v. Willington*, 25 L. J. Ch. 662; *Bailey v. Sweeting*, 30 L. J. C. P. 150; *Gibson v. Holland*, L. R. 1 C. P. 1.

(*g*) *Sims v. Landray*, (1894) 2 Ch. 318.

(*h*) *Norton v. Powell*, 4 M. & G. 42.

A letter beginning, "We hereby guarantee," signed with the name of a firm, and by each of the partners, though it would only have been a joint guarantee if signed in the name of the firm alone, or only by each of the partners, has been held to be a separate guarantee by each partner as well as a guarantee by the firm (*i*).

signed by one person.

It has recently been decided that the signature of the party to be charged to instructions for a telegraphic message, accepting the plaintiff's written offer, is a sufficient signature under the Statute of Frauds (*k*).

Signature of instructions for telegraphic message.

It is not necessary that the note in writing, to be binding under the statute, should be contemporary with the agreement. It is sufficient if it had been made at any time, provided it be made before action (*l*), and adopted by the party afterwards, and then anything under the hand of the party, expressing that he had entered into the agreement, will satisfy the statute, which was only intended to protect persons from having parol agreements imposed on them (*m*). But, as held by *Fry, J.*, in a very recent case, the memorandum or note of agreement required by the 4th section must be a memorandum of an agreement complete at the time the memorandum is made (*n*).

Memorandum in writing need not be contemporary with agreement.

But when the memorandum is made there must be a complete agreement in existence.

To satisfy the Statute of Frauds, it is not necessary that the agreement of the parties should be contained in

Agreement need not be contained in

(*i*) *Ex parte Harding, In re Smith*, 12 Ch. D. 557; 41 L. T. 388; 28 W. R. 158.

(*k*) *Godwin v. Francis*, L. R. 5 C. P. 295; *M'Blain v. Cross*, 25 L. T. (N.S.) 804.

(*l*) *Lucas v. Dixon*, 22 Q. B. D. 357; *Sievwright v. Archibald*, 17 Q. B. 103; as the Statute of Frauds affects only the mode of proof, the rule requiring the memorandum to be made before action must be considered anomalous; but it is founded on the wording of the statute. *Per LINDLEY, L.J.*, in *In re Hoyle, Hoyle v. Hoyle*, (1893) 1 Ch. at p. 97.

(*m*) *Per Lord ELLENBOROUGH*, in *Shippey v. Denison*, 5 Esp. at p. 193. See also *Tawney v. Crowther*, 3 Bro. C. C. 161; *Bradford v. Roulston*, 8 Ir. C. L. R. (N.S.) 468; *Longfellow v. Williams*, 2 Peake, 225.

(*n*) *Munday v. Asprey*, 13 Ch. D. 855.

one written
instrument.

one written instrument. It may be contained in *several* different papers, which, taken together, form the agreement between the parties (a). But these different papers must be, in themselves, and on the face of them, connected, either in express words or by containing those which are capable of an interpretation which, in its sense, connects the different instruments. Parol evidence is not admissible for the purpose of connecting them (b). However, it is *semble* admissible to explain the circumstances under which a document was written, and, if such evidence connects it with another document, the two can be read together if they jointly constitute a sufficient memorandum within the Statute of Frauds (c). Moreover, parol evidence is always admissible to identify a document referred to, or to show that a reference which *may be* to a document is so in fact (d).

In *Bluck v. Gompertz* (e), the defendant gave to the

(a) *Stead v. Liddard*, 8 Moo. 2; *Redhead v. Cater*, 1 Stark. 14; *Sandilands v. Marsh*, 2 B. & Ald. 680; *Buxton v. Rust*, L. R. 1 Ex. 1; *Hemming v. Perry*, 2 M. & P. 375; *Hare v. Rickards*, 5 M. & P. 35; *Brettell v. Williams*, 4 Exch. 623; *Macrory v. Scott*, 5 Exch. 907; *Colbourn v. Dawson*, 10 C. B. 765; *Coe v. Duffield*, 7 Moo. 252. See also *Jackson v. Lowe*, 7 Moo. 219; *Dobell v. Hutchinson*, 3 A. & E. 355; *Hammersley v. Baron de Biel*, 12 Cl. & F. 45; *De Beil v. Thompson*, 3 Beav. 469; *Ridgway v. Wharton*, 6 H. L. 238; 27 L. J. Ch. 46; *Ogilvie v. Foljambe*, 3 Mer. 53; *Horsey v. Graham*, L. R. 5 C. P. 9; *Jones v. Williams*, 7 M. & W. 493; *Nene Valley Drainage Commissioners v. Dunkley*, 4 Ch. D. 1; *Baumann v. James*, L. R. 3 Ch. App. 508; *Peck v. N. Staffordshire Rail. Co.*, 32 L. J. Q. B. 241; *Boydell v. Drummond*, 11 East, 142; *Long v. Millar*, 4 C. P. D. 450; *Taylor v. Smith*, (1893) 2 Q. B. 65.

(b) 1 Sm. L. C., 10th ed., p. 297. *Fitzmaurice v. Bayley*, 9 H. L. C. 78; *Taylor v. Smith*, (1893) 2 Q. B. 65; *Chapman v. Callis*, 9 C. B. (N.S.) 769; 30 L. J. C. P. 241; *Potter v. Peters*, 64 L. J. Ch. 357; 72 L. T. 624; *Long v. Millar*, 4 C. P. D. 450; *Shardlow v. Cotterell*, 20 Ch. D. 90; *Cave v. Hastings*, 7 Q. B. D. 125. See *Wilkinson v. Evans*, L. R. 1 C. P. 407.

(c) *Oliver v. Hunting*, 44 Ch. D. 205.

(d) *Long v. Millar*, *ubi supra*; *Taylor v. Smith*, *ubi supra*.

(e) 7 Exch. 862.

plaintiff a guarantee, signed by the defendant. Subsequently, it was discovered that there was a mistake in the instrument of guarantee. This mistake was accordingly rectified by an indorsement written across the guarantee itself by the defendant, but signed by the plaintiff only. It was held that the instrument was a valid memorandum of the contract declared on, within the Statute of Frauds, since the indorsement, having been made for the purpose of correcting the mistake, and being written by the defendant on the same piece of paper as the original undertaking, must be considered as authenticated by the original signature of the defendant.

It is also sufficient if a signed paper refer to another paper which is not signed, and which contains the terms of the agreement between the parties (*f*). And the fact that one paper was executed before the other was written makes no difference provided the whole was one transaction (*g*). Where a subsequent document is relied on as supplementing the written contract and curing defect therein it must clearly refer thereto or it will not be available for the purpose (*h*).

Where a court has to find a contract in a correspondence and not in one particular note or memorandum formally signed, the *whole* of what has passed between the parties must be taken into consideration, even though the first two letters of the correspondence seem of themselves to constitute a complete and binding contract (*i*). Once, however, there is a complete

If signed paper refer to unsigned paper, statute satisfied.

Rule where contract has to be collected from correspondence.

(*f*) *Filby v. Hounsell*, (1896) 2 Ch. 737; *Tawney v. Crother*, 3 Bro. Ch. Cas. 161; *Allen v. Bennet*, 3 Taunt. 169; *Saunderson v. Jackson*, 2 B. & P. 238; *Stead v. Liddard*, 1 Bing. 196; *De Beil v. Thompson*, 3 Beav. 469; *Coldham v. Showler*, 3 C. B. 312.

(*g*) *Coldham v. Showler*, 3 C. B. 312.

(*h*) *Coombs v. Wilkes*, (1891) 3 Ch. 77; and see *Filby v. Hounsell*, *supra*; *Morris v. Wilson*, 5 Jur. (N.S.) 168.

(*i*) *Hussey v. Horne Payne*, 4 App. Cas. 311; *Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs*, 44 Ch. D. 616; and see *May v. Thomson*, 20 Ch. D. 705.

contract *one* of the parties cannot without the consent of the other, by subsequent negotiation, get rid of the crystallized contract (*a*).

Statute
satisfied by
rough draft,
though more
formal
document
intended.

A memorandum, which fairly comprises all the material terms between the parties, is an enforceable contract within the 4th section of the Statute of Frauds though a more formal document was intended (*b*).

The stamping
of a
guarantee.
It cannot be
given in
evidence
without a
stamp.

It may be as well to say a few words here as to the *stamping* of an instrument of guarantee (*c*). The instrument of guarantee is not available for any purpose whatever and cannot be given in evidence unless it is properly stamped in accordance with the law in force when it was first executed (*d*). A stamp is not, however, necessary to every writing given in evidence to support an agreement, but only to agreements themselves or minutes or memorandums of agreements. Thus an offer in writing accepted by parol does not require a stamp (*e*). On the other hand, however, a memorandum of a guarantee requires a stamp even though it does not state on its face the consideration for the promise (*f*), for it is not a necessary element of liability to duty that the instrument should contain all the particulars of the contract (*g*). In *Glover v. Hackett* (*h*), H. being tenant to E., G. signed the following document:—"August 2nd. According to Mr. H.'s request, the land at B., under Mr. E., I will

(*a*) *Bellamy v. Debenham*, 45 Ch. D. 481.

(*b*) *Gray v. Smith*, 43 Ch. D. 208, C. A.

(*c*) The Stamp Act 1891 (54 & 55 Vict. c. 39), governs this subject.

(*d*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (4). If the agreement be not under seal, a 6d. stamp suffices; *Ib.* Schedule.

(*e*) *Drant v. Brown*, 3 B. & C. 665; *Chaplin v. Clarke*, 4 Ex. at p. 407; *Hudspeth v. Yarnold*, 9 C. B. 625; *Clay v. Crofts*, 20 L. J. Ex. 361.

(*f*) *Whitfield v. Moojen*, 1 F. & F. 290.

(*g*) *Hughes v. Budd*, 4 Jur. 454; *per* TINDAL, C.J., in *Vaughton v. Brine*, 1 M. & G., at p. 364; 1 Scott, N. R. 358.

(*h*) 26 L. J. Ex. 416.

be bound for till next Lady-day; rent 48*l.* (Signed) J. G." The document being tendered in evidence, in an action by G. against H. for money paid to the landlord, it was held that it required an agreement stamp. However, a guarantee in writing *for the payment of goods* thereafter to be purchased by a third person to a certain amount is within the exception of the Stamp Act, 1891, "an agreement for or relating to the sale of goods," and need not be stamped (*i*). An indemnity against the claim of a third person to goods sold is also exempt (*k*). In *Haigh v. Brooks* (*l*), the promise was alleged in the declaration as having been given in consideration of the giving up of a guarantee. Plea, that it was not given up. It was held, that this guarantee could be given in evidence without being stamped. Where the defendant wrote on the back of a letter of the plaintiff an undertaking to be answerable for the debt of another, and which endorsed undertaking made reference to the terms of the agreement on the other side, it was held, in an action on the guarantee, that only one stamp was required on this paper (*m*). A guarantee for the due performance of a charter-party does not, it seems, require to be stamped as an "agreement or contract for the charter of any ship or vessel," or as "a memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any other person for or relating to the freight or conveyance of any money, goods, or effects on board of

Guarantee for
payment of
goods
requires no
stamp.

(*i*) *Warrington v. Furber*, 8 East, 242. Stamp Act, 1891 (54 & 55 Vict. c. 39), First Schedule, title, "Agreement." See also *Curry v. Edensor*, 3 T. R. 524; *Watkins v. Vince*, 2 Stark. 368; *Waddington v. Bristow*, 2 B. & P. 452; *Martin v. Wright*, 6 Q. B. 917; *Sadler v. Johnson*, 16 M. & W. 775; *Chatfield v. Cox*, 18 Q. B. 321.

(*k*) *Heron v. Granger*, 5 Esp. 269.

(*l*) 10 Ad. & Ell. 309, 323, and see *Drant v. Brown*, 3 B. & C. 665.

(*m*) *Stead v. Liddard*, 1 Bing. 196.

the ship or vessel," within the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 49 (1) (a).

A guarantee may, on terms, be stamped any time after execution.

A guarantee can be stamped any time *after* execution on the terms set forth in s. 15 of the Stamp Act, 1891 (54 & 55 Vict. c. 39). So much, however, of this section as limits the time within which the Commissioners of Inland Revenue may mitigate or remit any penalty payable on stamping documents *after* execution has been repealed by s. 15 of the Finance Act, 1895 (58 Vict. c. 16).

Sufficient if Statute of Frauds once satisfied by memorandum in writing.

It is sufficient if the Statute of Frauds has once been satisfied by a memorandum in writing. Thus, before 9 Geo 4, c. 14, a *verbal* promise was sufficient to revive a liability on a *written* guarantee which was barred by the Statute of Limitations (b).

The Statute of Frauds if relied upon must be pleaded.

It has been already pointed out on an earlier page (c), to which the reader is referred, that as a general rule (d), which, however, is not without exceptions (e), the party relying on the Statute of Frauds must expressly plead it.

(a) See *Rein v. Lane and Others*, L. R. 2 Q. B. 144. This is a decision on 5 & 6 Vict. c. 79, s. 2, which, so far as it affects charter parties, has been repealed.

(b) *Gibbons v. McCasland*, 1 B. & Ald. 690.

(c) Page 56.

(d) R. S. C., Order XIX. r. 15.

(e) See *Bunning (Pauper) v. Odhams Bros. Limited*, 13 T. L. R. 65.

CHAPTER IV.

THE LIABILITY OF THE SURETY.

IN order to ascertain the extent and nature of a surety's liability, the instrument under which his liability arises must be looked at. It is therefore proposed in the first place briefly to call attention to the general rules which exist as to the *construction of guarantees*.

Extent and nature of surety's liability to be ascertained from guarantee itself.

In the construction of all grants and contracts, it is a general rule that "as between the grantor and grantee or between the maker of an instrument and the holder, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee or holder" (*f*). This paraphrase of the well known maxim *Verba fortius accipiuntur contrà proferentem* does not seem to be open to the same objections as the maxim itself, which, though it is to be found in a great many text books and also in a great many judgments of ancient date, cannot, it seems, be considered as having any force at the present day, so far, at all events, as grants are concerned (*g*). With regard to *contracts* not under seal the generally received doctrine of law undoubtedly is that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention that he should be bound; and on the other hand, that the party who

The construction of contracts of guarantee.

(*f*) Broom's Legal Maxims, 6th ed., p. 549; and see Chitty on Contracts, 13th ed., p. 129, 130.

(*g*) Per JESSEL, M.R., in *Taylor v. Corporation of St. Helen's*, 6 Ch. D. at p. 270; *Grey v. Pearson*, 6 H. L. C. 61; *Roddy v. Fitzgerald*, 6 H. L. C. 823; *Abbott v. Middleton*, 7 H. L. C. 68.

receives the instrument should rather have a construction put upon it in his favour because the words of the instrument are not his but those of the other party (a). An idea seems formerly to have prevailed, and, indeed, in some cases it was actually laid down, that the contract of guarantee must be construed differently from other contracts. Thus, in *Nicholson v. Paget* (b), *Bayley, B.*, said: "Now this is a contract of guarantee, which is a contract of a peculiar description; for it is not a contract which the party is entering into for the payment of his own debt, or on his own behalf, but it is a contract which he is entering into for a third person, and we think that it is *the duty* of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself." Now this opinion of *Bayley, B.*, is directly opposed to the doctrine of law above mentioned, and can no longer be considered as sound. Thus, in *Mayer v. Isaac* (c), *Alderson, B.*, disapproved of the ruling of *Bayley, B.*, and said he preferred the rule laid down in *Mason v. Pritchard* (d), where it is said that the ordinary rule of construction is applicable to the contract of guarantee, and that, like all other contracts, it must be construed in favour of the party receiving it (e). So also in the modern case of *Wood v. Priestner* (f) the court declined to adopt the opinion of *Bayley, B.*, in *Nicholson v. Paget* (g); and Baron *Martin* said, he thought that the contract of guarantee should be read in the same way as any other contract. The result of the authorities, therefore, seems to be, that in the construction of guarantees it is a general

(a) *Per* ALDERSON, B., in *Mayer v. Isaac*, 6 M. & W. at p. 612.

(b) 1 C. & M. 68; *N. C.*, 3 Tyr. 164. See also *Evans v. Whyte*, 5 Bing. 485.

(c) 6 M. & W. 605.

(d) 12 East, 227.

(e) See also *Hargreave v. Smee*, 6 Bing. 249.

(f) L. R. 2 Ex. 66.

(g) 1 C. & M. 68; 3 Tyr. 164.

rule that a guarantee is, like any contract to be construed against the contractor and in favour of the person receiving it. This rule, however, being one of strictness and rigour, is the last to be resorted to, and is never to be relied upon except when *all* other rules of exposition fail (*h*). Thus, for example, there is a very important general rule of construction which must never be lost sight of, and which must often restrain its operation, namely, that a surety is not to be charged beyond the precise terms of his engagement (*i*). Dealing with it as a mercantile contract, the court does not apply to a guarantee mere technical rules, but construes it so as to give effect to what may fairly be inferred to have been the real intention and understanding of the parties as expressed in the writing; for, to bind a person by a contract of guarantee, the language used must express clearly an intention to take on himself the liability of a surety (*k*). If the writing falls short of that, or if the expressions used be doubtful or ambiguous (provided they cannot be explained), no contract of guarantee arises (*l*). In the recent case of *Dane v. Mortgage Insurance Corporation* (*m*) an

Surety not to be charged beyond precise terms of his engagement.

h) Broom's Legal Maxims, 6th ed., p. 356; *per curiam Lindus v. Melrose*, 3 H. & N. 177. 182.

i) *Wright v. Russell*, 2 W. Bl. 934; *Tanner v. Woolmer*, 8 Ex. 482; 22 L. J. Ex. 259; *Pearsall v. Summersett*, 4 Taunt. 593; *Chalmers v. Victors*, 16 W. R. 1046; *Walker v. Hardman*, 11 C. & F. 258; 11 Bligh, 229; *Carr v. Wallachian Petroleum Co., Limited*, L. R. 2 C. P. 468; *Meek v. Wallis*, 27 L. T. R. 650. The recent case of *Henton v. Paddison*, 68 L. T. R. 405, well exemplifies what is stated in the text.

k) *Per* FITZGERALD, J., in *Bank of Montreal v. Munster Bank*, 11 Ir. R. C. L., at p. 55; and see *Barber v. Mackrell*, 41 W. R. 341; 68 L. T. 21; *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218; 25 W. R. 582; 46 L. J. Ch. 545; 36 L. T. 310.

l) *Per* FITZGERALD, J., in *Bank of Montreal v. Munster Bank*, *supra*. In this connection it may be mentioned that in construing a document on a *printed* form (a guarantee to a bank is usually of this character) the erasure of certain words may be taken as some indication of intention. *Caffin v. Aldridge*, (1895) 2 Q. B. 648, C. A.

m) (1894) 1 Q. B. 54, C. A.

instrument purporting to be a policy of insurance which guaranteed to the assured the payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same, was held by the majority of the Court of Appeal (Lord *Esher*, M.R. and *Lopes*, L.J.) to be not a guarantee in the usual sense of the term, but a contract of insurance. *Kay*, L.J. did not dissent from this view, but did not deem it material to the point in issue to consider the question. So, again, the two classes of contributories liable to pay calls on the winding up of a public company do not stand to each other in the relation of principal and surety, though past members are only liable to make good the defaults of present members (*a*). Moreover, the assignor of a lease, though he is liable for the rent on his express covenant to pay it contained in the original lease, should the assignee make default, is not a surety in the true and proper sense of the term (*b*). His liability is *not* collateral, but *primary*, namely, that a certain rent shall be paid periodically.

Where a party becomes surety to another, but the instrument by which he becomes surety in terms creates only a joint liability, then, in the absence of any proof to the contrary, the intention of the parties must be taken to be that the surety is only so to the extent limited by the instrument. He does not intend to become, and does not become, surety out and out and under all circumstances, but he only undertakes a joint liability with others (*c*).

It may be convenient to mention in this place that though the assignee of an equity of redemption does

(*a*) *Helbert v. Banner*, *In re Barnard's Bank*, L. R. 5 H. L. 28; *Kellock v. Enthoven*, L. R. 9 Q. B. 241.

(*b*) *Per curiam*, in *Baynton v. Morgan*, 22 Q. B. D. 74, 77, 80, 83, C. A.

(*c*) *Per KINDERSLEY, V.-C.*, in *Other v. Iveson*, 3 Drew. 177; and see *York City & County Banking Co. v. Bainbridge*, 43 L. T. R. 732.

not render himself liable, by his acceptance of the assignment, to pay interest on the mortgage debt, should the mortgagor make default in doing so, there being no privity of contract between him and the mortgagee, he might, *semble*, if some new consideration moved from the mortgagee, become surety for the repayment of the mortgage debt (*d*).

Another general rule of construction is, that in the construction of guarantees, as indeed in the construction of all contracts, they must be interpreted according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement (*e*); unless such natural or literal meaning would lead to an absurdity (*f*); or the context affords an interpretation different from the ordinary meaning of the words; or their conventional meaning is not the same with their legal sense, in which latter case the meaning to be attributed to the words of the contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation (*g*). Where there are no words of doubtful trade meaning, and the extrinsic facts are not in controversy, the question whether the words used amount to a contract of guarantee are not for the jury, but are for the determination of the court alone (*h*). It seems that general evidence as to the meaning of the words of a contract ought not to be admitted without a distinct averment on the record as to the

Natural meaning to be given to words of guarantee.

(*d*) *In re Errington, ex parte Mason*, (1894) 1 Q. B. 11, 14.

(*e*) *Per* Lord WATSON in *M'Cowan v. Baine*, (1891) A. C. at p. 408; *Allnutt v. Ashenden*, 5 M. & G. 392; *Haigh v. Brooks*, 10 A. & E. 309; *S. C.*, in error, *ib.*, p. 323. *Per* JESSEL, M.R., in *Taylor v. Corporation of St. Helens*, 6 Ch. D. at p. 270.

(*f*) *Chalmers v. Victors*, 16 W. R. 1046. *Per* ALDERSON, B., in *Eastern Union Rail. Co. v. Cochrane*, 9 Ex. at p. 206.

(*g*) *Per* Lord WATSON in *M'Cowan v. Baine*, (1891) A. C. at p. 408.

(*h*) *Bank of Montreal v. Munster Bank*, 11 Ir. C. L. R. 47.

particular words to which the proof is to be directed, and the precise technical or trade meaning which is intended to be attributed to them (*a*).

Whole contract must be considered.

It is likewise a general rule of construction that *the whole instrument* must be considered in construing a guarantee. Thus, when the guarantee is by bond, the *extent* of the *condition* of such bond may be *restrained* by the *recitals*, as will be seen in a subsequent part of this chapter (*b*). Whether, however, the condition of the bond is actually restrained by the recitals, is often a very difficult question to determine (*c*).

Construction should give effect to contract if possible.

It is a further general rule that the construction shall be favourable, so as to support and give effect to the instrument, if possible (*d*).

In construing a guarantee, as in the construction of every contract (whether under seal or not), the court will, if possible, give effect to it, it being a maxim of our law that *Benignæ faciendæ sunt Interpretationes propter simplicitatem Laicorum ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire* (*e*). In the case of *Wood v. Priestner* (*f*), which was an action upon a guarantee, Baron Bramwell said, that there was a *presumption* against the defendant giving an invalid document or the plaintiff receiving it. And in *Stewart and McDonald v. Young* (*g*), it was laid down by Wills, J., that though the court may be

(*a*) *Per* Lord WATSON in *Sutton & Co. v. Ciceri & Co.*, 15 App. Cas. 144.

(*b*) See *post*, p. 258, *et seq.*, and see *Glyn v. Hertel*, 8 Taunt. 208; *Pearsall v. Summersett*, 4 Taunt. 593; *Kirby v. Duke of Marlborough*, 2 M. & S. 18. But see *Bank of British North America v. Curillier*, 4 L. T. 159.

(*c*) See *Parker v. Wise*, 6 M. & S. 239; *Gordon v. Rae*, 8 E. & B. 1005; *Evans v. Earle*, 10 Exch. 1; and see note (*d*), 3 Dougl. 326.

(*d*) *Broom v. Batchelor*, 1 H. & N. 255; *Steele v. Hoe*, 14 Q. B. 431; *Oldershaw v. King*, 2 H. & N. 517; *Heffield v. Meadows*, L. R., 4 C. P. 595; *Ford v. Beech*, 11 Q. B. 852; *Pugh v. Stringfield*, 4 C. B. (N.S.) 364; *S.C.* 3 C. B. (N.S.) 2; *Dally v. Poolly*, 6 Q. B. 494.

(*e*) Co. Litt. 36 a., and see *McCowan v. Baine*, (1891) A. C. 401.

(*f*) L. R. 2 Exch. 66.

(*g*) 38 Sol. J. 385.

of opinion that, if the defendant had understood the words of the guarantee, he would not have entered into it, and that the language used carried more than perhaps the parties contemplated, effect will be given to the guarantee, and the surety will not be relieved from his liability thereunder.

In addition to these general rules of construction, it will be well also to call attention in this place to a principle of law, which, though not itself a rule of construction, frequently has an important bearing when questions arise as to the meaning of a written instrument. This is the doctrine that parol evidence is not admissible to *contradict* a written document, and consequently, that where there is no ambiguity in the words used, parol evidence to fix a meaning upon them is not admissible at all. Thus parol evidence that the defendant (who had drawn and delivered a bill of exchange to the plaintiff for the accommodation of the acceptor and as surety for him) had agreed with the plaintiff and the acceptor that the payment of the bill should depend upon a contingency, was held not to be admissible as it contradicted or varied the express written contract on the face of the bill (*h*). On the other hand, parol evidence is admissible to show that there is no agreement at all, as when, though the memorandum has been signed by both parties, it has never been handed over to the party entitled to its custody (*i*). Parol evidence is also admissible to *explain* a written instrument when ambiguities occur

Parol evidence not admissible to *contradict* written document, but only to *explain* it.

(*h*) *Abrey v. Crux*, L. R. 5 C. P. 37. So in *Bunning (Pauper) v. Odhams Bros.*, 13 T. L. R. 65, p. 3, cited *ante*, pp. 32, 56, it was held that parol evidence was inadmissible to show that a guarantee to printers in these terms, namely, "If you will bring out the present number I will *repeat* my guarantee to see you paid in full," was given in substitution for a prior *verbal* guarantee in respect of *past* numbers.

(*i*) *Pattle v. Hornibrook*, (1897) 1 Ch. 25; 45 W. R. 123; *Pym v. Campbell*, 4 W. R. 528; 6 E. & B. 370.

Surrounding circumstances may be given in evidence in explanation.

in it (a). "The surrounding circumstances" are frequently looked at where the contract requires explanation: *e.g.*, to ascertain the subject-matter of the contract (b). Thus, in a recent case, where the wife of a retail trader who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the following guarantee: "I do hereby guarantee to you the sum of 500*l.* This guarantee is to continue in force for the period of six years and no longer," it was held that in the construction of this document the court was entitled to look at the surrounding circumstances, that is to say, to consider, first, who the parties were; secondly, in what position they were; and, thirdly, what the subject-matter of the agreement was. Upon full consideration of these circumstances the court came to the conclusion that the guarantee was limited to goods actually supplied to the husband after it was given (c). Where a guarantee was given to a bank, to cover any *advances* made to the surety's son, who was a stockbroker, it was held that to enable the court to construe the word "*advances*" parol evidence of the surrounding circumstances was admissible to show that it comprised not merely cash advances or overdrafts, but the proceeds of bills or notes discounted (d). Though, in construing a contract, the court is entitled to look at the surrounding circumstances and other matters which existed *at the time* of the making of the contract, it is not entitled to

(a) *Edwards v. Jerns*, 8 C. & P. 436; *Hoad v. Grace*, 7 H. & N. 494; 31 L. J. Exch. 98; *Goldshede v. Swan*, 1 Exch. 154; *Bainbridge v. Wade*, 16 Q. B. 89; *Garrett v. Handley*, 4 B. & C. 664.

(b) *Heffield v. Meadows*, L. R. 4 C. P. 595; *Chalmers v. Victors*, 16 W. R. 1046; *Spark v. Heslop*, 1 El. & El. 563, 570; *Coles v. Pack*, L. R. 5 C. P. 65, 70, 71; *Leathley v. Spyer*, L. R. 5 C. P. 595; *Laurie v. Scholefield*, L. R. 4 C. P. 622.

(c) *Morrell v. Cowan*, 7 Ch. D. 151; 26 W. R. 90; 47 L. J. Ch. 173; 37 L. T. 586; *Henton v. Paddison*, 68 L. T. 405, 407.

(d) *Grahame v. Grahame*, 19 L. R. Ir. 249.

look at any negotiations which may have taken place beforehand (e).

Having thus briefly treated of the construction of the contract of guarantee, let us now proceed to consider—

The liability of the surety. Division of the subject.

First, The nature of the surety's liability (*infra*).

Secondly, When the liability of the surety arises (p. 211).

Thirdly, How such liability may be enforced (p. 224).

Fourthly, What is the extent of such liability (p. 233).

First, the nature of the surety's liability.

The nature of the surety's liability.

It appears from the very definition of a guarantee, that the person giving it is not answerable till the default of another person (f).

Difference between the liability of the surety and that of the principal debtor.

The liability of the former (the surety) is, therefore termed *secondary*, whilst that of the latter (the principal debtor) is termed *primary* (g).

No privity of contract between surety and principal debtor. Consequences of this.

Between the surety and the principal debtor there is no privity of contract, for the surety contracts with the creditor. Consequently, in the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action in which he is sued by the creditor, for it is *res inter alios acta* (h). Moreover, the

(e) *Per* LOPES, L.J. in *Taff Vale Rail. Co. v. Davis & Sons*, (1894) 1 Q. B. at p. 54.

(f) Fell on Guarantees, 2nd ed., p. 1; and *Mallet v. Bateman*, L. R. 1 C. P. 163.

(g) Though it is essential to contract of suretyship that, *inter eos* at all events, the liability of the one (the debtor) shall be primary and that of the other (the surety) shall be secondary, it does not, therefore, follow that whenever there is this distinction between the respective liabilities of two persons, the relation between them is that of principal and surety. Thus, in the case of the transferor and transferee of shares in a joint stock company, it has been held that their relation is not that of principal and surety but of primary and secondary liability. See *Roberts v. Crowe*, L. R. 7 C. P. 629; *Helburt v. Banner*, L. R. 5 H. L. 28; *Nevill's case*, 6 Ch. App. 43; *Hudson's case*, L. R. 12 Eq. 1.

(h) *Ex parte Young*, *In re Kitchen*, 17 Ch. D. 668; 50 L. J. Ch. 824; 45 L. T. 90. See also American cases of *Douglass v. Howland*, 24 Wendell, 35; *Graves v. Bulkley*, 37 Amer. R. 249 (U. S.) and see *post*, p. 225.

debtor's admission of liability does not dispense with proof thereof in an action against the surety brought by the creditor (a). However, the entry by a deceased collector of taxes of moneys received by him made in a book which he kept for his own *private* convenience was in one case held to be good evidence as against his surety, though the persons from whom the money was received were alive and might have been called as witnesses (b). So, if a defaulter be sued for his default and thereupon gives the surety notice of the pendency of the action, upon which the surety requests him to defend it, the declaration of the defaulter may, it seems, under such circumstances be given in evidence against the surety (c). Thus, in an action by a sheriff against the surety of a bailiff who had kept back money, a written admission by the bailiff of the receipt of this money was held to be evidence against the surety, the bailiff being considered as substantially the defendant in the action (d). In a recent *American* case it was held that the surety for good behaviour in an office is not estopped from contesting the correctness of the principal debtor's voluntary official reports as to the amount of money in his hands at the commencement of the term for which the bond was given (e). But official books and reports which the official is bound to furnish as one of the duties incidental to his office, are in *Ireland* (f), and *America* (g), and, therefore, presumably in *England* also, presumptive evidence against him and his sureties. Where a Guarantee Society

(a) *Erans v. Beattie*, 5 Esp. 26.

(b) *Middleton v. Melton*, 5 M. & R. 264, and see *Whitnash v. George*, 8 B. & C. 556; *Middleton v. Melton*, 10 B. & C. 322; *Goss v. Watlington*, 6 Moore C. P. 355.

(c) *Taylor on Evidence*, 9th ed., vol. i., p. 508.

(d) *Perchard & Hamerton v. Tindall*, 1 Esp. 394.

(e) *Van Sickle v. County of Buffalo*, 42 Amer. R. 753 (U. S.)

(f) *Guardians Abbeyleix Union v. Sutcliffe*, 26 L. R. Ir. 333.

(g) *Town of Union v. Bermes*, 43 Amer. R. 369 (U. S.); *Boone County v. Jones*, 37 Amer. R. 229 (U. S.).

became surety for an official liquidator and entered into a bond which provided that the certificate of the chief clerk on taking the accounts of the liquidation should be conclusive evidence against the surety as to the amount due from the liquidator, it was held that even after such certificate had been given the Court had power to allow the accounts to be re-opened at the surety's request, upon certain terms, as it was proved that the liquidator's accounts had (but in accordance with the usual practice) been carried in and vouched without notice to the surety (*h*).

It was formerly a rule of pleading, that if he who was party or privy in estate or interest, or he who justified in right of him who was party or privy, pleaded a deed, he must make profert of it to the court (*i*). But in the case of *Bain v. Cooper* (*k*), it was held, that a *surety* might plead a release to his *principal* without making profert of the deed. *Parke*, B., in his judgment, said, "The general rule with respect to profert is correctly stated in *Dangerfield v. Thomas* (*l*), viz., that a party is not required to make profert of an instrument, to the possession of which he is not entitled. The only exceptions to that rule are, where the party pleading acts as tenant of another, or where there is a privity of interest between them, as in the case of a release to a reversioner, of which the tenant for life may avail himself. So, also, in the cases of heir and executor, who may plead a release to the ancestor or testator whom they respectively represent; so, also, with respect to several tortfeasors, *for, in all these cases, there is a privity between the parties which constitutes an identity of person; but there is no privity between the surety and principal, for the surety contracts with the creditor.*

(*h*) *In re Birmingham Brewing, Malting and Distillery Co., Limited*, 31 W. R. 415; 52 L. J. Ch. 358; 48 L. T. 632.

(*i*) *Dr. Leyfield's Case*, 10 Co. R. 88; *profert* has been rendered unnecessary by the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), s. 55.

(*k*) 1 D. (N.S.) 11, 14.

(*l*) 9 Ad. & E. 292.

They do not constitute one person in law, and are not jointly liable to the plaintiff."

As a general rule surety not liable if principal debt not legally enforceable.

Except under certain circumstances, to be explained hereafter, the surety is not liable on his guarantee where the principal debt cannot be legally enforced. This is in accordance with the *lex contractus*, which prevents contracts from becoming operative, *unless and until* all conditions precedent are fulfilled, and, as is obvious, the existence of a principal debtor is a condition precedent to the operation of the contract of guarantee (a). Thus it is stated in *Pothier on Contracts* (b), that, "As the obligation of sureties is according to our definition an obligation accessory to that of a principal debtor, it follows that it is of the essence of the obligation that there should be a valid obligation of a principal debtor; consequently, if the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation according to the rule of law, *cum causa principalis non consistit, nec æa quidem quæ sequuntur, locum habent*. L. 178, ff. de Reg. Jur." (c). However, where directors guarantee the performance of a contract by their company which does not bind the latter, as being *ultra vires*, the directors' suretyship liability is enforceable (d).

Surety's liability may continue even after that of the principal debtor has ceased.

Again the liability of a surety may continue even after that of the principal debtor has ceased. Thus, in the case of a surety to the assignor of a lease for the due payment of rent and fulfilment of covenants by the assignee, if, on the bankruptcy of the latter, the trustee in bankruptcy (or now the official receiver) disclaim all

(a) *Mountstephen v. Lakeman*, L. R. 5 Q. B., 613; L. R. 7 Q. B. 196, 202; 7 H. L. 17; and see *Commercial Bank of Tasmania v. Jones*, (1893) A. C. 313.

(b) Evans' ed., vol. i., p. 229.

(c) See *Lewis v. Jones*, 4 B. & C. 506, 513.

(d) *Yorkshire Railway Wagon Co. v. Maclure*, 19 Ch. D. 478; *N. C.*, 21 Ch. D., C. A. *Becket v. Towers Assessment Committee*, (1891) 1 Q. B. 638, C. A.

interest in the lease, such disclaimer, though it may operate to relieve the bankrupt assignee of the lease from liability, does not extinguish that of the surety, which continues during the remainder of the term assigned (*e*). Under such circumstances, however, the surety can, it seems, apply under s. 55, par. 6, of the Bankruptcy Act, 1883, for an order vesting the disclaimed property in him (*f*). It is provided by the Bankruptcy Act, 1883, that an order discharging a bankrupt "shall not release any person who, at the date of the receiving order, was a partner or a co-trustee with the bankrupt, or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him" (*g*).

Secondly, When does the liability of the surety arise?

When does the surety's liability arise?

It is in all cases essential, before the surety can be called upon to fulfil his engagements, that the principal debtor shall have made default. Thus, if the alleged default were owing to the creditor's misconduct, the surety will not be held liable (*h*). Again, if the principal debtor has not made default at all, the surety is not liable. This appears from the case of *Walker v. British Guarantee Association* (*i*), where the following were the facts:—The treasurer of a benefit building society, within statutes 6 & 7 Will. 4, c. 32, and 10 Geo. 4, c. 56, covenanted with the society's trustees

Principal debtor must have made default

(*e*) Bankruptcy Act, 1883, s. 55 (2), and see prior to the Act, *Harding v. Preece*, 9 Q. B. D. 281; 47 L. T. 100; 51 L. J. Q. B. 215; 31 W. R. 42; see also *Ex parte Walton*, 17 Ch. D. 746, 755; *East and West India Dock Co. v. Hill*, 22 Ch. D. 14.

(*f*) Baldwin's Law of Bankruptcy, 6th ed., p. 218. The court may now by the Bankruptcy Act, 1890, s. 13, in making a vesting order modify the terms prescribed by the proviso in sub-s. (6) of s. 5 of the Bankruptcy Act, 1883.

(*g*) 46 & 47 Vict. c. 52, s. 30, par. 4.

(*h*) *Halliwel v. Counsell*, 38 L. T. 176.

(*i*) 18 Q. B. 277; *Lloyds v. Harper*, 16 Ch. D. 290; 50 L. J. Ch. 140; 29 W. R. 452; 43 L. T. 481; *King v. Cole*, 2 Ex. 628.

that he would faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duties, and punctually account to the trustees for all and every sum and sums of money, bills, notes, securities, goods and chattels, which he, in his office of treasurer, should receive on the society's account. The defendants, as his sureties, guaranteed to the building society the due observance of this covenant. It appeared that the treasurer was bound by the rules of the society to pay over, in a given time, the *same* moneys which he received. It was held, that such an obligation was only that of a bailee, that he did not violate such obligation, if, after receiving moneys, and before he had an opportunity of paying them over, he was robbed of them by irresistible violence and without fault of his own, and that to an action against the sureties of the treasurer by the trustees of the society, complaining that the treasurer had not paid the *said* moneys, a plea by the sureties of robbery committed upon their principal, in excuse of his non-payment, was an answer to the action.

After default
made,
creditor may
sue surety
before suing
principal
debtor.

Once the principal has actually committed a *default*, for which the surety is responsible, *as a general rule a cause of action immediately arises against the surety*. And, consequently, as a general rule, and in the absence of any express or implied stipulation to the contrary, the creditor need not, *before* suing the surety, sue the principal debtor (*a*), even though such principal debtor

(*a*) *Ranelagh v. Hayes*, 1 Vern. 189; *Wright v. Simpson*, 6 Ves. jun. 714, 733. See *post*, Chap. V., as to the *right* of the surety to compel the creditor to sue the principal debtor *before* having recourse to the surety. The provision in Magna Charta (c. 8) that "neither shall the pledges of the debtor be distrained as long as the principal debtor is sufficient for the payment of the debt," applies only to pledges and nuncupators who, by express words, are not responsible unless their principals become insolvent, and so are conditional debtors only. *Att.-Gen. v. Resby*, Hardres. p. 377; *Att.-Gen. v. Atkinson*, 1 Y. & J. 207, 212; and see also *The Queen v. Fay*, 4 Ir. L. R. 606. *S. C.* in C. A. at p. 618, *Ib.*

be quite solvent (*b*). Nor, where the principal debtor has been guilty of felony, need the creditor prosecute him before suing the surety (*c*). If, indeed, a surety bond is conditioned for the exercise of diligence by the obligee in collecting the debt guaranteed (*d*), or the guarantee contain an express stipulation that the surety shall not be liable to the creditor, except on the failure of the "utmost efforts and legal proceedings" of the creditor to obtain payment or compensation from the principal debtor, the creditor, before he can recover, must show that the prescribed stipulation has been complied with (*e*). But where the guarantee contained a proviso that, before the surety was to be called upon, the creditor must have availed himself to the utmost of any *bonâ fide* securities which he held of the principal debtor, and it was proved that the plaintiff had neglected to adopt means to enforce payment of a bill by a party *who was shown to be totally insolvent*, it was held that the surety was not discharged (*f*).

Aliter, where guarantee contain express stipulation to the contrary.

It is quite clear, therefore, that, *in the absence of* express stipulation to that effect, a creditor who holds securities from the principal debtor for his debt need not first resort to them before suing the surety (*g*).

Creditor may sue surety before resorting to securities for debt received from debtor.

This doctrine of the English law, that a right of action accrues to the creditor as against the surety *immediately* upon any default of the principal debtor, is a peculiar one, and does not, generally speaking, prevail in other systems of jurisprudence.

The *Roman law* (*h*) gave to sureties the power to compel the creditor to sue the principal debtor, before

Roman law gave sureties right to

(*b*) See Hardres's Reports in the Exchequer, p. 377; and see *Smith v. Freyler*, 47 Amer. R. 358 (U. S.).

(*c*) *Lee v. Bayes*, 18 C. B. 599.

(*d*) *Salt Springs National Bank v. Glover*, 64 New York S. C. R. 265.

(*e*) *Holl v. Hadley*, 2 A. & E. 758.

(*f*) *Musket v. Rogers*, 8 Scott, 51.

(*g*) *Ranelagh v. Hayes*, 1 Vern. 189; *Wilks v. Heeley*, 1 C. & M. 249.

(*h*) Nov. 4, c. 1.

compel
creditors to
sue principal
debtor first.

having recourse to the sureties, unless, indeed, he could show that such a proceeding would be useless by reason of the debtor's insolvency or absence, or unless the surety expressly renounced this power of compelling the creditor to sue (a).

This right
exists in most
countries.

This provision of the Roman law seems to have been adopted in most of those countries whose municipal law is based upon the Roman civil law. Chancellor *Kent* in *Hayes v. Ward* (b) has well remarked, that "a rule of such general adoption shows that there is nothing in it inconsistent with the relative rights and duties of principal and surety, and that it accords with a common sense of justice and the natural equity of mankind."

In absence
of express
contract,
principal
debtor need
not be
requested by
creditor to
pay before
surety is
sued.

Besides the rule that it is unnecessary for the creditor, before having recourse to the surety, to sue the debtor, there are also many other important rules which follow as the consequences of the English law, that a right of action accrues to the creditor immediately upon a default by the principal debtor. Thus, except where by the terms of the contract the debtor is not chargeable without it, he need not even be requested to pay (c).

The case of *The Belfast Banking Company v. Stanley* (d) is an important decision, delivered in Ireland, proceeding upon this principle. There a promissory note was given by A. and B. jointly. The note having become long overdue, the payee sued upon it. One of the defendants, B., upon this, pleaded that he joined in the note as surety for A., of which the plaintiff was aware, and that he was discharged from such suretyship by the plaintiff having delayed, for an unreasonable time, to demand payment from A. (the other maker), to

(a) Mackeldeii, *Systema Juris Romani*, s. 438.

(b) 4 Johns. New York Ch. Cas. at p. 132.

(c) *Rede v. Far*, 6 M. & S. 121; *Lilley v. Hewett*, 11 Price, 494; *Holbrow v. Wilkins*, 1 B. & C. 10; *Warrington v. Furber*, 8 East, 242; *Walton v. Mascall*, 13 M. & W. 452.

(d) 15 W. R. 989; I. R. 1 Com. Law, Q. B. 693.

wit, for ten years. It was held that this plea did not disclose any defence, and was consequently bad. So, again, the creditor is entitled to sue the surety without previously demanding payment of him (*e*) ; just as a debt due can, in ordinary cases, be sued for without a previous demand. Where, however, there is a covenant or promise to pay a collateral sum *on demand* by a surety for the principal debtor, then request must be made before action brought, or before the money can be considered as owing by the collateral debtor (*f*). Thus, where a mortgage deed contains a covenant by the mortgagor and surety to pay on demand, there is no breach until demand made of the condition in the bond (*g*). On the other hand, where there is a present debt and a covenant or promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action (*h*). It sometimes happens that, under the circumstances of the case, a right of action against the surety does not arise till some demand has been made on him, though the creditor be not *expressly* bound to make such demand. Thus, where a person binds himself, by guarantee, to indorse any bills which may be given in part payment of a debt, to be contracted by a third person, the rule of law is, that a demand upon the surety to fulfil his engagement must be made, and within a reasonable and convenient time (*i*). As the surety can be sued without any previous demand being made upon him, it is, as a rule, not even necessary that the creditor should previously inform him of the default or neglect to pay of the principal debtor, unless the surety has *expressly*

Nor need surety himself be requested to pay in absence of express stipulation on the subject.

Nor is it necessary even to inform surety of default having been made.

(*e*) *Hitchcock v. Humphrey*, 5 M. & G. 559.

(*f*) *In re J. Brown's Estate, Brown v. Brown*, (1892) 2 Ch. 300 ; and see also in *Sicklemore v. Thistleton*, 6 M. & S. 9 ; *Batson v. Spearman*, 9 A. & E. 298.

(*g*) *In re J. Brown's Estate, Brown v. Brown*, *supra*.

(*h*) *Ib.* ; per CHITTY, J. ; and see *Birks v. Trippett*, 1 Wms. Saund. 32.

(*i*) *Payne v. Ives*, 3 D. & Ry. 664.

stipulated for notice; (a) though an omission to give the surety this information might affect the question of costs. Thus, it has been held, that presentment or notice of dishonour is not necessary to keep alive the liability of a person, not a party to the instrument, who has guaranteed that a bill or note shall be paid by the acceptor (b), who, if his acceptance be *general* and not *qualified*, is himself liable without presentment for payment (c). But where a debtor indorsed a bill of exchange, of which he was the indorsee, over to his creditor by way of *collateral* security for his debt, and the creditor did not present it at maturity, nor give the debtor notice of its dishonour when presented, it was held, that the creditor could not recover in an action either on his original debt or upon the bill of exchange (d). And it would seem that if such want of presentment or notice of dishonour, owing to the peculiar circumstances of the case, were to amount to *unreasonable* neglect on the part of the holder of the bill or note, the guarantor would be discharged from all liability (e). Cases of this kind would seem to depend upon the circumstances peculiar to each (f).

(a) *Cutler v. Southern*, 1 Wms. Saund. 115; *Ker v. Mitchell*, 2 Chit. 487; Com. Dig. Condition (T.); *Hurlstone on Bonds*, p. 83 *et seq*; *Sicklemore v. Thistleton*, 6 M. & S. 9; *Batson v. Spearman*, 9 Ad. & E. 298; and see *Carr v. Browne*, 12 Moore, 12; *Phillips v. Fordyce*, 2 Chit. 676.

(b) *Hitchcock v. Humphrey*, 5 M. & Gr. 559; *Walton v. Mascall*, 13 M. & W. 72; *Holbrow v. Wilkins*, 1 B. & C. 10; *Carter v. White*, 25 Ch. D. 666, C. A.; *Van Wart v. Woolley*, 3 B. & C. 439; *Warrington v. Furber*, 8 East, 242.

(c) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 52 (1); as to what is a *qualified* acceptance see s. 19 (2) of the Act. If the drawer were the party guaranteed, or perhaps if the acceptance were *qualified*, presentment would be necessary to render surety liable. See *Chalmer's Bills of Exchange*, 5th ed., p. 152; and see *Black v. Ottoman Bank*, 15 Moo. P. C. 472, 484.

(d) *Peacock v. Pursell*, 14 C. B. (N.S.) 728; 32 L. J. C. P. 266; 10 Jur. (N.S.) 178; 8 L. T. 636; 11 W. R. 834.

(e) *Philips v. Astling*, 2 Taunt. 206.

(f) *Per ABBOTT, C.J.*, in *Van Wart v. Woolley*, 3 B. & C. 439, 448.

Where the guarantee is only to operate on the occurrence of a certain event, it may become necessary for the creditor to give notice to the surety of the occurrence of such event, before proceeding upon the guarantee (*g*). Where guarantee to operate on certain events notice of occurrence of such event necessary.

The liability of the surety—like any other liability arising on a contract—may, by express stipulation, be made to depend on the performance of *conditions precedent* to its accrual (*h*). And when this is the case, the liability of the surety is, of course, not complete until all *conditions precedent* to his liability have been fulfilled (*i*). Liability of surety may depend on performance of conditions precedent.

Thus, a contract by way of guarantee, to pay over to the creditor moneys received as the proceeds of the property of the debtor, is conditional, not only upon the receipt of money, the proceeds of such property, but on the receipt of such money properly payable to him; and does not apply to money received only subject to a prior claim of a third party, and which, therefore, is not payable to the creditor (*k*). So where the guarantee stipulated that 1,000*l.* should be lent for seven days to a third person by bankers, who, instead of placing 1,000*l.* to the credit of such third person, during the next seven days allowed him, by cheques drawn in the ordinary way, to overdraw his account to an amount somewhat less than 1,000*l.*, it was held that the condition imposed by the guarantee had not been fulfilled (*l*). Again, where the vendor of a business to a company guaranteed to the shareholders thereof a minimum dividend for the term of five years, it was

(*g*) See *Morten v Marshall*, 9 Jur. (N.S.) 651.

(*h*) It has already been seen, when the nature of the surety's liability was described, that the existence of a principal debtor is a condition precedent to the very existence of a guarantee, and therefore essential to the surety's liability, *ante*, p. 210 *et seq.*

(*i*) *Elworthy v. Maunder*, 2 Moo. & P. 482; *Pearce v. Morrice*, 2 Ad. & E. 84; *Lawrence v. Walmsley*, 31 L. J. C. P. 143; 10 W. R. 344; 5 L. T. 798; *Phillips v. Fordyce*, 2 Chit. 676; *Mortgage Insurance Co. v. Pound*, 64 L. J. Q. B. 394, C. A.

(*k*) *Jupp v. Richardson*, 26 L. J. Ex. 261.

(*l*) *Burton v. Gray*, L. R. 8 Ch. App. 932.

reversed
36 L.T. 272

held, that the guarantee was given upon the implied condition that the company should carry on the whole concern as it existed at the first, and that the company having broken the contract, or its part, the vendor was discharged from his guarantee (*a*). So, where in consideration of the plaintiff agreeing to supply A. with goods, to enable him to carry out his contract with the Government, the defendant guaranteed to the plaintiff the payment of the goods *when the Government paid A. the amount of the contract*, it was held, that the Government having, before the performance of the contract, dismissed A. and employed some one else in his place, and not having therefore paid to A. the *whole amount* of the contract, the plaintiff was not entitled to recover (*b*). So also, in another case, H. & Sons being engaged, under a contract in writing, in the erection of certain engineer's work for N., for which iron and brass castings were required, and *Hill*, the founder from whom the castings were procured, having a claim against H. & Sons to the amount of 218*l.* for goods already supplied, and refusing to continue the supply without obtaining payment or security for that sum, N. consented to give *Hill* a guarantee in the following terms:—

“May 22nd, 1861. Mr. J. N. agrees to pay to Mrs. *Hill*, ironfounder, on H. & Son's account, the sum of 218*l.*, being the amount owing to her by them, together with interest, in six months from the above date, *providing he has work done as security for the same.*” In an action by the representatives of *Hill* against N. upon this guarantee, it was held, that it was *a condition* of N.'s liability thereon, that, at the end of the six months, work should have been done by H. & Sons for him in respect of which a debt should be due from him to

reversed 36 L.T. 272

(*a*) *Brown & Co. v. Brown*, 35 L. T. 54.

(*b*) *Hemming v. Trenery*, 2 Cr. M. & R. 385. See also *Moor v. Roberts*, 3 C. B. (N.S.) 830.

them; and that the plaintiffs could not recover without producing the contract between H. & Sons and N. under which the work was done (c). In *London Guarantee and Accident Co. v. Fearnley* (d), the following were the facts:—By an agreement, and a policy of insurance, the defendants agreed to reimburse the plaintiff any pecuniary loss, to the amount of 1,000*l.*, which he might sustain by reason of any such fraud or dishonesty of A. in connection with his employment by the plaintiff, as should amount to embezzlement, and should be committed and discovered during the continuance of the policy. The policy provided (among other things) “that the employer shall, if and when required by the company (but at the expense of the company if a conviction be obtained) use all diligence in prosecuting the employed to conviction for any fraud or dishonesty as aforesaid, which he shall have committed, and in consequence of which a claim shall have been made under the policy, and shall, at the company’s expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed, or by his estate, of any moneys which the company shall have become liable to pay.” It was held by Lords *Blackburn* and *Watson* (*Selborne*, L.C., *diss.*), that the prosecution of A. for embezzlement was a condition precedent to the plaintiff’s right of action upon the policy. But where, in consideration of the plaintiff agreeing to stay proceedings in an action against A. until a given day, and proceeding to trial with an action against B., the defendant promised to indemnify the plaintiff against all costs and expenses connected with the action against B., *whether the same should be decided in favour of the plaintiffs or of B.*: it was held, that the *final* determination of the action

(c) *Hill v. Nuttall*, 17 C. B. (N.S.) 262. See also *Burbridge v. Child*, 10 Jur. (N.S.) 106.

(d) 5 App. Cas 911; 43 L. T. R. 390; 28 W. R. 893.

against B. was not a condition precedent to the plaintiff's right to sue for costs, and that the consideration was satisfied by the plaintiff staying proceedings against A. and going to trial against B (a).

In *Lewis v. Hoare* (b), the facts were as follows:—The respondent advanced money to the appellant on a guarantee “to be repaid on the completion of six houses in accordance with a contract between myself and T.” One of the terms of the contract was that the houses were to be built to the satisfaction of a surveyor, and payment was to be made upon his certificate. No such certificate had been given. In an action on the guarantee brought by the respondent against the appellant, the jury found, that as a matter of fact the houses were completed. It was held, that the respondent was entitled to recover, notwithstanding the absence of the certificate. Where, a plaintiff having given the defendant promissory notes and a cognovit for 500*l.* as a composition for certain claims, the defendant, *in consideration of the money so secured to be paid*, engaged to indemnify him against certain liabilities, it was held that the security, not the actual payment, was the consideration, and that the plaintiff might sue on the guarantee, though he had not paid the 500*l.* (c). In *Russell v. Trickett* (d), the facts were as follows:—By a deed between a local board of the first part, certain contractors of the second part, and the defendant of the third part, the contractors covenanted to do work upon the basis of a specification; and the defendant covenanted to pay any losses that might be

(a) *Wilson v. Bevan*, 7 C. B. 673. See also *Christie v. Borelly*, 7 C. B. (N.S.) 561; *Moreten v. Marshall*, 9 Jur. (N.S.) 651; *Coyte v. Elphick*, 22 W. R. 541; *Crick v. Warren*, 2 F. & F. 348; *Dimmock v. Sturla*, 14 M. & W. 758; 15 L. J. Ex. 65, which are instances of conditions precedent.

(b) 29 W. R. 357; 44 L. T. R. 66. See also *Ex parte Ashwell*, 2 Dea. & Chit. 281.

(c) *Ikin v. Brook*, 1 B. & A. 124.

(d) 13 L. T. 280.

sustained from the non-performance of the work. The deed recited that the specification had been signed by five members of the local board, as was required by the Local Act. In point of fact, the specification had never been signed, although it had been acted upon. Held, that the mere fact of the specification not having been signed did not release the sureties from their liability.

The most common examples, perhaps, of the existence of a condition precedent to the liability of the surety, are cases in which a guarantee is given in consideration of time being given to the principal debtor (*e*); or, in which a guarantee is given in which it is intended that others shall join.

Where a guarantee is given in consideration of the plaintiff undertaking to forbear to sue a third person for a certain period, or where the nature of the transaction shows that this was the intention of the parties, forbearance to sue before the expiration of the period agreed upon is a condition precedent to the plaintiff's right of action on the guarantee (*f*).

In a similar manner, where a person executes a surety-bond on the *faith* (but not otherwise) (*g*) of its being at some subsequent time also executed by another person as co-surety, or by the principal debtor himself, the execution by such co-surety or principal debtor is a condition precedent to the liability of the person who thus executes. Consequently he is not bound by the bond unless this condition be fulfilled (*h*). However, where there are more than one surety on the face of a deed, it does not follow that one is not bound by his signature unless the others sign. That is not the law,

Execution of guarantee by co-surety is sometimes a condition precedent to surety's liability.

(*e*) *Crears v. Hunter*, 17 Q. B. D. 341, *ante*, pp. 23, 26.

(*f*) *Rolt v. Cozens*, 18 C. B. 673.

(*g*) See *Ward v. National Bank of New Zealand*, 8 App. Cas. 755.

(*h*) *Bonser v. Cox*, 4 Beav. 379; *Evans v. Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 101; and see *Pattle v. Hornibrook*, (1897) 1 Ch. 25, where lessor made it a condition that some responsible person should join in lease with intending lessee.

and unless either the parties expressly stipulate that one surety should not be bound unless the others were, or the deed was delivered as an escrow, the omission of one surety to sign would not relieve the others from liability (a). Where a surety stipulated with the principal debtor that a bond, executed by himself and the principal, should not be used or delivered to the plaintiff (the obligee) until it had also been executed by a co-surety, it was held in *America*, that as the bond was regular on its face, containing nothing to suggest a suspicion that it was not complete, and the plaintiff had no notice to the contrary, the surety was liable on the bond, though the principal debtor had delivered it to the plaintiff without obtaining its execution by a co-surety (b).

A very good example of the rule, that a suretyship may be made dependent on the execution of a deed by others, is afforded by the well-known case of *Emmet v. Dewhurst* (c). There W. D., by indenture, agreed to guarantee a certain composition to all the creditors of J. D. who should, before a fixed day, execute a release of their debts. The plaintiff, who was a creditor of J. D., did not execute by the time named, but insisted that this delay had taken place in consequence of an arrangement entered into between him and the agent of W. D., the effect of which was to bind the plaintiff to accept the composition, but to allow him to postpone his execution of the release. It was held, dismissing a bill filed by the plaintiff against W. D. for specific performance of agreement to pay the composition, that there was no evidence that the agent of W. D. had authority to enter into any new agreement; that if such authority had been proved, the agreement being

(a) *Coyte v. Elphick*, 22 W. R. 541, 544.

(b) *Singer Manufacturing Co. v. Drummond*, 47 New York S. C. R. 260; *Bangs v. Bangs*, 48 New York S. C. R. 41.

(c) 3 Mac. & G. 587.

within the 4th section of the Statute of Frauds, any alteration in its terms must have been evidenced by writing; that the condition in the original agreement not having been performed by the plaintiff, the agreement never took effect so far as he was concerned; and that in the absence of fraud no parol agreement could be substituted.

It should, however, be here observed that it has been decided that a surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him, and become a specialty creditor of his (*d*). Moreover, where a defence of this kind is relied upon, there must be some evidence, either of an agreement by the plaintiff with the defendant that such co-surety should execute, or that the defendant executed the instrument on the faith of the others doing so (*e*). Thus, where in an action against a surety the defendant had pleaded an equitable plea, founded on the non-execution of the security by a co-surety, and it appeared that the proposal of another surety came from the plaintiff, and was not at the time made a *condition* by the defendant, it was held that the defence failed (*f*).

To relieve surety, omission by another to execute an instrument must amount to breach of a condition precedent.

In the case of *Horne v. Ramsdale* (*g*), it was also held that the existence of the alleged condition precedent was not made out. In that case the declaration stated that one T. was the lessee of certain tolls, and that one S. and the defendant agreed to join with T. in a bond conditioned for payment of the rent under the lease, and it alleged as a breach that the defendant refused to join

(*d*) *Cooper v. Evans*, L. R. 4 Eq. 45.

(*e*) *Ward v. National Bank of New Zealand*, 8 App. Cas. 755.

(*f*) *Traill v. Gibbons*, 2 F. & F. 358. See also *Austen v. Howard*, 7 Taunt. 28; *Cumberlege v. Lawson*, 1 C. B. (N.S.) 709; but see *Barry v. Moroney*, 8 Ir. R. C. L. 554.

(*g*) 9 M. & W. 329.

T. in the bond. The defendant pleaded, first, that at the time of tendering the bond to him S. had not executed the same, nor was he present ready to execute it jointly with the defendant; secondly, that S. died before the commencement of the suit, and that before his death the bond was not tendered to the defendant for execution, nor was he requested to execute it. It was decided that the pleas were bad. Lord *Abinger*, C.B., thus described the nature of the contract: "It is a contract by each of the intended sureties to join in the bond with T. the principal; *i.e.*, to execute the bond in the character of surety. It is not a contract that they shall execute it in the presence of each other, or that if one died the other shall be at liberty to refuse to execute it." Again in *Dallas v. Walls (a)*, the following were the facts: A bank, having advanced certain sums to a company, made a further advance upon the personal security of three of the directors. Five of the guarantors for the amount secured by an earlier bond signed an agreement that they would join the three directors in guaranteeing repayment to the bank of the further advance in equal proportions with the three directors. One of the five who signed this agreement stated by his affidavit that his signature (if he did sign) was obtained "on the express agreement and understanding" that the agreement should be signed by all the guarantors for the sum secured by the bond. It was held that the words "express understanding" were utterly unmeaning, and that the court would never pay any attention to a statement that something was done on an express engagement unless the engagement was deposed to in a manner which was admissible in evidence.

How surety's
liability may
be enforced

Thirdly. The nature of the surety's liability having been indicated, and *when* it is that such liability arises,

(a) 29 L. T. R. 599. And see *Dodge v. Pringle*, 29 L. J. Ex. 115.

it is now necessary to consider *how such liability may be enforced against the surety*.

It is important to bear in mind that the surety is entitled to have the liability proved as against him in the same way that it has to be proved against the principal debtor (b). For the admissions of a principal debtor can only (if ever) be received in evidence against the surety upon his collateral undertaking where the declarations of the principal were so made during the transaction of the business for which the surety was bound as to become part of the *res gestæ* (c). Therefore, in the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action by the creditor (d). And, on a guarantee to pay for goods sold and delivered to a third person, what such person has said respecting the goods sold to him is not evidence to charge the person giving the guarantee; but independent proof must be given of the delivery of the goods (e). A plaintiff, holding a guarantee for the good behaviour of a contractor, had judgment recovered against him for damages occasioned by the negligent acts of such contractor. It was held, in *America*, that, in an action against the sureties on their guarantee, the plaintiff was entitled to produce witnesses who had been before the court upon the trial of the action wherein judgment was recovered against the plaintiff, in order to establish negligence on part of contractor, for which the latter was primarily liable (f).

(b) See *ante* p. 207 *et seq.*

(c) Taylor on Evidence, 9th ed. vol. i., p. 508; *Ayer v. Getty*, 53 New York S. C. R. 287.

(d) *Ex parte Young, In re Kitchner*, 17 Ch. D. 668; 50 L. J. Ch. 824; 45 L. T. 90, following the *American* case of *Douglass v. Howland*, 24 Wendell, 35.

(e) *Evans v. Beattie*, 5 Esp. 26; *Bacon v. Chesney*, 1 Stark N. P. Rep. 192; *Longenecker v. Hyde*, 6 Binn. 1.

(f) *Mayor, &c., of New York v. Brady*, 84 New York S. C. R. 241.

Action the usual way of enforcing surety's liability.

In the majority of cases, of course, the creditor, as plaintiff, seeks to enforce his liability by means of an action against the surety as defendant.

In an action brought for this purpose, one of the first things which, before the passing of the Judicature Act, had to be considered, was the form of action to be adopted. With regard to this, it was held, that the surety must be sued *specialty* on the guarantee, and not on the common counts (*a*). However, where, on the trial of an action upon a guarantee for the payment of work done for a third person, the plaintiff at first shaped his case upon a guarantee, but afterwards resorted to the common counts, and made out the defendant's liability *as a principal*, and recovered a verdict on those counts, it was held that the verdict could not be disturbed (*b*). So, also, in *Wilson v. Marshall* (*c*), where a *verbal* guarantee was given for the supply of goods to a third person, and, subsequently to the supply of the goods, the defendant admitted his liability under the guarantee, it was held that the plaintiff was entitled to recover on accounts stated.

Plaintiff may now proceed against surety by specialty indorsed writ.

It is now provided by the Rules of the Supreme Court, 1883, that where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a guarantee, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the forms in Appendix C. s. 4, as shall

(*a*) *Mines v. Sculthorpe* 2 Camp. 215. See also *Jones v. Fleeming*, 7 B. & C. 217.

(*b*) *Edge v. Frost*, 4 D. & R. 243.

(*c*) 15 Ir. C. L. R. 467.

be applicable to the case (*d*), and need not, *semble*, disclose the fact that defendant is a surety (*e*). Where a portion of the sum claimed by a specially indorsed writ was stated to be due to the plaintiff for money paid by him as the defendant's surety, for his use and at his request, and for costs, it was held that the claim could be maintained in this form, and was none the less "a *liquidated demand*," because it included costs (*f*). A plaintiff cannot, however, in his special indorsement claim *interest* unless his right thereto arises by contract, express or implied, or by statute (*g*). Where the writ is specially indorsed, it is provided that no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim (*h*). After the defendant has appeared to such a writ, the plaintiff may make summary application for judgment in manner provided by Ord. XIV. of the Supreme Court Rules, 1883. The defendant may, however, show cause why judgment should not be signed and obtain leave to defend. Where, in an action against a surety on a specially indorsed writ, it was not shown that the debt had been acknowledged by the principal debtor, or that particulars had been furnished to the defendant, or that he had admitted his liability, it was held that the defendant might reasonably call on the plaintiff to prove his claim, and should be allowed

(*d*) Ord. III. r. 6. And see Jud. Act, 1875, App. C. s. 4, Forms 10 and 11. The Rules of Supreme Court, Nov. 1893, enable the court to amend a special indorsement or to deal with the claim specially indorsed as if no other claim had been included in the indorsement. (Order XIV. (1) (b). See *Arden v. Boyce*, (1894) 1 Q. B. 796.

(*e*) *Caldwell v. Wren*, 12 Ir. L. T. 146; but see *Ahern v. O'Donovan*, 15 Ir. L. T. 17.

(*f*) *Boreland v. Curry*, 4 L. R. Ir. 273; *Gerrard v. Cottrell*, 10 Q. B. 679.

(*g*) *Wilks v. Wood*, (1892) 1 Q. B. 684, C. A.; *Paxton v. Baird*, (1893) 1 Q. B. 139.

(*h*) Supreme Court Rules, 1883, Ord. XX. r. 1 (a).

to defend without paying money into court or giving security (a).

Indorsement
for trial with-
out pleadings
where claim
on a
guarantee.

The Supreme Court Rules of November, 1893, introduced a new kind of indorsement, namely, an indorsement for trial *without pleadings* (b). Such an indorsement seems to apply to every form of claim, and would, therefore, be available in an action against a surety upon his guarantee. As regards the form of the indorsement, something more precise than a general indorsement is required, yet not containing all the details necessary in a special indorsement which is a statement of claim (c).

In cases where the plaintiff does not or cannot proceed against the surety by means of a specially indorsed writ the statement of claim must be framed in accordance with the rules of pleading contained in the Supreme Court Rules, 1883 (d).

Where the amount of the surety's liability does not exceed 50*l.*, proceedings may be taken in the county court to enforce it (e).

Parties to
actions on
guarantees.

As regards the question, who must be joined as plaintiffs or defendants in an action upon a guarantee, the following principles and decisions are of importance:—

The plaintiffs
to action on a
guarantee.

First, as regards the persons who may enforce a guarantee, that is to say, under ordinary circumstances, *the plaintiffs* (f). It has been decided that where the

(a) *Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262; 45 L. J. Ex. 406; 34 L. T. 584; 24 W. R. 678.

(b) Order XVIII*a*.

(c) Odger's Principles of Pleading, 2nd ed., p. 5.

(d) Order XIX. See Jud. Act, 1875, App. C. s. 4, Forms 10 and 11.

(e) The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56; where the action on the guarantee has been commenced in the High Court and the claim indorsed on the writ does not exceed 100*l.*, the court may, on the application of either party at any time, order such action to be tried in a county court: *Ib.* s. 65.

(f) Ord. XVI. of the Supreme Court Rules, 1883, governs the subject of parties to High Court actions. Rule I of this Order and Order III.

interest of persons in a guarantee is *actually joint*, but, *in terms, is joint and several*, the action must be brought in the names of *all* the persons to whom the guarantee was given (*g*). In an action by persons jointly interested in a guarantee, it is not necessary that, as between themselves, their interest in the sum sought to be recovered from the surety should be *joint*; but, as between the plaintiffs and defendants, the damages to be recovered under the instrument must be *joint* (*h*). And, on the one hand, it seems that where a guarantee is addressed to, among other persons, one who has no interest whatever in the subject-matter guaranteed, such person need not be joined as a plaintiff. Thus, in *Place v. Delegal* (*i*), E., as attorney for the plaintiffs, who were executors of M., sold an estate, to a share of the proceeds of which W. was entitled as legatee of M. The defendant claimed W.'s share of such proceeds under an agreement with W. Thereupon the plaintiffs paid the amount to the

r. 1, of the County Court Rules, 1889, have lately (*i. e.*, Dec., 1896) undergone some revision in accordance with the suggestion made by Lord RUSSELL, of Killowen, L.C.J., in *Carter v. Rigby*, (1896) 2 Q. B. 113, C. A. They now provide that all persons may be joined as plaintiffs who claim relief jointly, severally, or in the alternative, in respect of the same transaction where a common question of law or fact arises.

(*g*) *Pugh v. Stringfield*, 3 C. B. (N.S.) 2. The Supreme Court Rules, 1883, Order XVI. r. 1, provide that all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and r. 11 states that, "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." This latter rule, it seems, gives a discretion to the court which should be exercised in accordance with the principles upon which the old pleas in abatement, now abolished, would have succeeded or failed. *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.*, (1893) 1 Q. B. 422, C. A.

(*h*) *Pugh v. Stringfield*, 4 C. B. (N.S.) 364.

(*i*) 4 Bing. N. C. 426. And see *Palmer v. Sparshott*, 4 M. & G. 137.

defendant on receiving from him a guarantee addressed to E., and also to the plaintiffs as executors of M., and undertaking to indemnify them, and each of them, against any action by W. It was held, that the plaintiffs might sue on this guarantee without joining E. On the other hand, however, persons who are actually interested in the subject-matter of the guarantee, but to whom it is not addressed, need not be joined as plaintiffs in an action brought against it. Thus, in *Agacio v. Forbes* (a), the plaintiff was a member of a partnership, and in consideration of the plaintiff's undertaking not to sue B. & Co., who were debtors to his firm, the defendant gave a guarantee to the plaintiff. It was held, that the contract being entered into with the plaintiff *personally* upon his undertaking not to sue B. & Co., it constituted a personal agreement, and that the plaintiff was entitled to sue the defendant in his own name without joining his partners as plaintiffs in the action.

The
defendants
to action on a
guarantee.

Next, as regards the persons against whom a guarantee may be enforced, that is, under ordinary circumstances, the defendants. It sometimes occurs that a guarantee which, at first sight, would appear joint, is really joint and several. Thus, in *Fell v. Goslin* (b), the plaintiffs sued the defendants jointly upon the following guarantee: "In consideration that you will sell to Mr. F. the distillery situate at, etc., and will take Mr. F.'s acceptance, to be dated September 29th, 1849, for 400*l.* (the amount of the purchase-money) and interest payable at six months after the date, we undertake and guarantee that the said sum of 400*l.* and interest shall be duly paid to you when the said acceptance arrives at maturity, in the proportion of 200*l.* each." It was held that the defendants were

(a) 14 Moore, P. C. C. 160.

(b) 7 Exch. 185. See also *Collins v. Prosser*, 1 B. & C. 682. And see *Palmer v. Sparshott*, 4 M. & G. 137.

severally liable to the plaintiff to the extent only of 200*l.* each.

Again, in the *Irish* case of *Armstrong v. Cahill* (c), where A., as principal, and three sureties, B., C., and D., executed a bond to E. for the fidelity of A. in certain duties for which he was employed by E., the bond was in the following form: "We, A., B., C., and D., are held and firmly bound to E. in the sum of 50*l.* each, to be paid to E., his executors, administrators, and assigns; to which payment well and truly to be made, we hereby bind us and each of us, our and each of our heirs, executors, and administrators, and every of them by these presents." It was held, that the bond was the separate bond of each obligor, binding each to pay the sum of 50*l.* in the event of default by the principal; and that, therefore, the payment of 50*l.* by B., one of the obligors, after breach, was no answer to an action on the bond against another obligor, C.

The plaintiff may now, at his option, join as defendants to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes (d). Where, however, an action is brought against *one* only of several *joint* contractors, the defendant is entitled as of *right*, under Order XVI. r. 11 of the Supreme Court Rules, 1883, to have his co-contractors joined as defendants (e).

It is now necessary to consider how far the liability of a surety can be enforced against him by way of set-off. For, although the persons entitled to the performance of a guarantee usually seek to enforce it as plaintiffs, it in some cases happens that they wish to avail themselves of their rights under the guarantee, by way of defence to same action brought by the person

Who may now be joined as defendants.

Right of set-off founded upon plaintiff's guarantee.

(c) 6 L. R. Ir. 440.

(d) Supreme Court Rules, 1883, Ord. XVI. r. 6.

(e) *Pilley v Robinson*, 20 Q. B. D. 155.

liable as surety. And it then becomes important to consider whether rights existing under a guarantee can be enforced against a surety by way of set-off.

Formerly, where a *mere liability* under a guarantee existed on the plaintiff's part, such *mere liability* could not have formed the subject of a set-off (*a*).

However, it was decided in the case of *Hutchinson v. Sydney* (*b*), that though a mere liability under a guarantee could not be set off, yet money that had *actually been paid* for another under an indemnity might be set off as money paid to the use of the plaintiff (*c*).

Set-off now
regulated by
Judicature
Rules.

The whole law relating to the right of set-off is now regulated by the Judicature Rules (*d*), which likewise enables the defendant to set up a counter-claim, which, as distinguished from a set-off, is the assertion of a separate and independent demand, but does not answer or destroy the original claim of the plaintiff (*e*). It would be outside the scope of this work to discuss at length the subject of set-off and counter-claim. Suffice it to say that both are the creation of statute (*f*) and that the Supreme Court Rule governing this subject (Order XIX. r. 3) was not intended to give rights against third persons, which did not exist before, but is a rule of procedure designed to prevent the necessity of bringing a cross-action where the set-off

(*a*) *Crawford v. Stirling*, 4 Esp. 207; *Morley v. Inglis*, 4 Bing. N. C. 58; 5 Scott, 314, 333.

(*b*) 60 Exch. 438; 24 L. J. Ex. 25.

(*c*) As to right of set-off possessed by surety, see *post*, pp. 320, 458 *et seq.*

(*d*) Rules of Supreme Court, 1883, Ord. XIX., r. 3. See, generally, *Annual Practice*, 1897, p. 463, *et seq.*

(*e*) *The Yearly County Court Practice*, 1897, pp. 112, 221. And see *Stooke v. Taylor*, 5 Q. B. D. 569. Though a counter-claim is not a cross-action, everything done in respect of the proceedings upon it must be treated as if it were. *M'Gowan v. Middleton*, 11 Q. B. D. 464, C. A. According to MATHEW, J. "a counter-claim is equivalent to a cross-action and is instituted as a cross-action." *Hood-Barrs v. Cathcart*, (1895) 1 Q. B. at p. 875.

(*f*) *Per* COCKBURN, C.J. in *Stooke v. Taylor*, 5 Q. B. D. at p. 575.

or counter-claim may conveniently be tried in the original action (g).

Fourthly. Having now shown what is the nature of the surety's liability, *when* it arises, and *how it is enforced*, it remains to consider the question, *what is the extent of the surety's liability?*

Upon this point it is to be observed, that the liability of the surety was always, it seems, the same both at law and in equity (h).

It is obvious that the extent of the surety's liability must vary in each case. Sometimes it is co-extensive with that of the principal debtor. Sometimes it is not co-extensive. The surety, however, can never be obliged to a greater extent than the principal debtor. He may be obliged for less than the debtor; but one who obliges himself in favour of another, for more than the other is obliged for, is not a surety (i), at all events, so far as the excess is concerned. Where the liability is co-extensive the question as to the extent is a very simple one. For *the measure* of the surety's liability is the loss sustained by the creditor through the default of the principal debtor. A good instance of this kind is furnished by the case of *Oastler v. Round* (k). There the plaintiff entered into a sub-contract with one B., a government contractor, to supply B. with certain articles within the period stipulated in a certain government contract. In the government contract there were penalties and deductions for delay in delivery, but these were not contained in the sub-contract. The defendants guaranteed the plaintiffs "the payment of the value" of the articles thus to be supplied by the plaintiffs to the government contractor "so soon as he should have received payment from the government." The plaintiffs supplied the goods, but did not supply

The extent of the surety's liability.

Was always the same both at law and in equity.

Not necessarily co-extensive with that of principal debtor.

(g) *Per* KAY, J., in *In re Milan Tramways Co.*, 22 Ch. D. at p. 126; *per* Lord ESHER, M.R. in *Stumore v. Campbell & Co.*, (1892) 1 Q. B. at p. 316.

(h) *Per* Lord ELDON in *Samuel v. Howarth*, 3 Meriv. 272, 277, 278.

(i) Theobald on the Law of Principal and Surety, pp. 3, 66.

(k) 11 W. R. 518.

them within the time named in the government contract held by B., and there was delay in delivery under both contracts. The government, however, did not exact any penalties, and paid B. (their contractor) at the full contract price. Obviously by accepting and keeping the goods supplied, B. became liable to the plaintiffs to pay for them, subject perhaps to any question with the government. Accordingly it was held, that B. was liable to pay the plaintiffs the full contract price under their contract with him, and that, therefore, the defendant was liable on his guarantee to the same amount.

Division of
the subject
of *extent* of
surety's
liability.

In many cases, however, it is by no means obvious, or agreed, that the liability of the surety and of the principal debtor are co-extensive. And, in such cases, it often becomes a matter of some difficulty to determine the exact extent of the surety's liability. The most convenient mode of discussing the subject will be to separately consider—

- (I.) As from what time a guarantee comes into operation, and the liability of the surety commences (*infra*) ;
- (II.) To what things, and how far, a guarantee extends (p. 235) ;
- (III.) How long a guarantee continues in operation (p. 242) ;
- (IV.) The liability of the surety for fraud committed by himself (p. 274) ;
- (V.) The effect on the surety's liability of a change in constitution of persons to or for whom the guarantee is given (p. 276) ;
- (VI.) The effect of bankruptcy of the surety (p. 293).

From what
time a
guarantee
comes into
operation.

(I.) As to the time from which a guarantee comes into operation and the liability of the surety commences. This depends upon the agreement made by the parties themselves. A guarantee only operates as from the time at which the parties intended that it should do so. Thus the liability of a surety for the good behaviour of a third person in an office extends

only to defaults committed after such third person has been *legally* appointed to the office (a). And, even if the condition of surety bonds recite the due appointment of such third persons to the offices contemplated, the sureties are not estopped by these recitals from showing that there had been no complete appointment (b). But, upon the other hand, a guarantee for the payment of goods supplied to a third person, if given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee (c).

(II.) It is now necessary to consider to what things, and how far, a guarantee extends.

Now, in some cases, by the instrument of guarantee itself, a limit is placed upon the extent of the liability of the surety. Where this is done the surety is liable up to such amount, but of course not beyond it. The rule as laid down by a modern text-writer and approved by the courts is this: "If a bond or guarantee is given by a surety to secure the repayment of advances of money to the principal, provided such advances do not exceed in the whole, at any one time, a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but it does not render the obligation void if the advances go beyond it, unless that clearly appears to have been the intention of the parties" (d).

Where a surety gives a continuing guarantee, limited in amount to a certain fixed sum, the question sometimes arises whether the suretyship is in respect of the *whole* debt, with a limitation on the liability of the

To what things, and how far, guarantee extends. Where the guarantee imposes a limit on surety's pecuniary liability.

Difficult sometimes to determine whether a guarantee

(a) *Kepp v. Wiggett*, 10 C. B. 35. See also *Nares v. Rowles*, 14 East, 510; *Webb v. James*, 7 M. & W. 279; *Holland v. Lea*, 9 Exch. 430.

(b) *Kepp v. Wiggett*, *ubi supra*.

(c) *Simmons v. Keating*, 2 Stark. 426.

(d) Addison on Contracts, 9th ed., p. 1002. Approved of in *Laurie v. Scholefield*, L. R. 4 C. P. 622. See also *Seller v. Jones*, 16 M. & W. 112; *Gee v. Pack*, 33 L. J. Q. B. 49; *Backhouse v. Hall*, 6 B. & S. 507; 34 L. J. Q. B. 141; 12 L. T. 375; 13 W. R. 654; *Parker v. Wise*, 6 M. & S. 246; *Gordon v. Rae*, 8 Ell. & Bl. 1087.

limited in amount is applicable to *whole* debt or to *part only* thereof.

Principles regulating this subject.

Ellis v. Emmanuel.

surety, or is applicable to a *part* only of the debt co-extensive with the amount of the guarantee. On this question the following principles were laid down in *Ellis v. Emmanuel* (a), namely: where a surety gives a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed (*primâ facie*, at least) as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee, limited in amount, *for a debt already ascertained*, which exceeds that limit, is not *primâ facie* to be construed as a security for part of the debt only; it is a question of construction on which the court is to say whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part of the debt only (b). It may, however, be plain from the words of a limited guarantee that though it is only given to secure a floating balance, it shall be applicable to the *whole* debt (c). In such a case the creditor is entitled, in the event of the principal's bankruptcy, to prove for the whole debt without any deduction, and the surety is not at liberty to stand in his shoes until every sixpence of the whole debt has been received by the creditor (c).

Surety for payment of calls not a contributory.

As regards the liability of a surety for the payment of calls which may be made on shares in a company, it has been decided that he is not liable to be placed on the list of contributories of the company (d).

(a) 1 Ex. D. 157; 46 L. J. Ex. 25; 34 L. T. 453; 24 W. R. 832.

(b) And see *Hobson v. Bass*, L. R. 6 Ch. App. 792; *Ex parte Rushforth*, 10 Ves. 409; *Payley v. Field*, 12 Ves. 435; *Bardwell v. Lydall*, 7 Bing. 489; *Ex parte Holmes*, Mont. & Ch. 301; *Gee v. Pack*, 33 L. J. Q. B. 49; *Thornton v. McKewan* 32 L. J. Ch. 69; *Gray v. Seckham*, L. R. 7 Ch. 680.

(c) *In re Sass*, *Ex parte National Provincial Bank of England*, (1896) 2 Q. B. 12; 44 W. R. 558; see also *In re Blakeley*, *Ex parte Aachener Disconto Gesellschaft*, 9 Morrell, 173; *Ex parte Wildman*, 1 Atk. 109.

(d) *In re Bank of Hindostan, China and Japan*, *Harrison's case*, L. R. 6 Ch. App. 286.

In other cases, however,—indeed, probably in the majority of cases,—either no limit to the surety's liability is laid down at all, or the limit mentioned is only a pecuniary one, and is of no assistance in determining whether losses which have occurred are of a class included within the guarantee or not. In such cases, the question whether or not the surety is liable has to be determined by general principles. And the great leading principle which applies to such cases is, that a surety for the performance of a contract of a third person can only be made liable for what is *strictly* loss sustained by breach of the contract (e). Accordingly, this principle is applied in determining whether a given loss is covered or not as answering the description of being what may properly be termed the principal thing guaranteed against, and the very subject-matter of the contract. For instance, a surety for the good behaviour of another in an office or employment is only liable to answer for those *defaults*—or rather for breaches of those duties only—which are strictly within the *scope* of the office or employment.

Surety never liable, excepting for loss sustained through default guaranteed against.

Surety for another's good conduct in an office liable only for default within scope of office.

Thus, in *Leigh v. Taylor* (f), it was held, that, as an overseer has not, by virtue of his office, any authority to *borrow* money, therefore, in an action against a surety on a bond, conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer, and applied by him to parochial purposes. Upon the other hand, the liability of the surety extends to transactions which, in the natural and usual order of things, take place on the faith of the guarantee. Thus where the defendant entered into a bond as

(e) *Warre v. Calvert*, 7 A. & E. at p. 154; *King v. Norman*, 4 C. B. 884; *Tanner v. Woolmer*, 8 Ex. 482; *Walker v. Broadhurst*, 8 Ex. 889; *Ex parte Broadhurst*, 2 De G. Mac. & G. 953.

(f) 7 B. & C. 491. See also *Napier v. Bruce*, 8 C. & F. 470; *Pattison v. Guardians of Belford Union*, 1 H. & N. 523; 26 L. J. Ex. 115; *Jephson v. Howkins*, 2 Scott, N. R. 605.

surety for the due and faithful performance by one C. of his duty as clerk to a provincial bank, and C. being sent by the manager of the bank, at the request of a customer, to his residence about eleven miles distant from the bank, for the purpose of receiving a large sum of money to be placed to his account—a considerable portion of it being in gold and silver—on his way back dropped the money from his pocket and lost it, it was held that the money was received by C. in the course of his employment as clerk to the bank; that the defendant was liable as surety, notwithstanding the finding of the jury that it was not the custom of bankers in that part of the country to send for their customers' money in the manner adopted; and that the loss of the money was *prima facie* evidence of gross negligence on the part of C. (a). So, in *Ogden v. Aspinall* (b), A. gave B. the following guarantee:—

“I have given C. an order to purchase cotton, and, as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts to the amount of those we may send to you for sale, on my account, and I engage that his bills on me, so transmitted, shall be regularly accepted and paid.” It was held, that, under this guarantee, B. was justified in honouring C.'s draft to the amount of a bill drawn by C. on A., and represented by C. to B. as being drawn on account of A., though such bill was in fact drawn by C. on his *own* account. In *Barber v. Mackrell* (c), the facts were as follows: The holder of two bills about to fall due agreed with the drawer (F.) to renew them if the

(a) *Melville v. Doidge*, 6 C. B. 450. See also *Saunders v. Taylor*, 9 B. & C. 35; *Hornsby v. Slack*, 1 Ir. C. L. R. 126.

(b) 7 D. & R. 637. See also *Pattison v. Guardians of Belford Union*, 1 H. & N. 523; *Loveland v. Knight*, 3 C. & P. 106; *Gwynne v. Burnell*, 7 Cl. & F. 572.

(c) 41 W. R. 341; 68 L. T. 21, C. A.

testator guaranteed the new bills, and the holder wrote to the testator to that effect, who replied, "I hereby guarantee the payment by F. of two bills you intend to renew for him—one for 1,048*l.* 10*s.* 5*d.*, and the other for 462*l.* 6*s.* 6*d.*—due respectively 28th inst. and 4th prox." Two bills were drawn by the holder on F. at three months, both dated the same day, for amounts differing from the former bills, but for the same amount in the aggregate. These bills were not met. It was held that the word "*renew*" was not used in its technical sense by the testator, but that he meant to guarantee the payment of the amount of the old bills, and that nothing had happened to discharge him from his guarantee. In *Mortgage Insurance Co. v. Pound* (d), the defendants (directors of M. Co.) agreed to repay the plaintiffs all sums which they should pay under a policy of insurance, whereby the payment of principal and interest on certain debentures issued by the M. Co. was guaranteed by plaintiffs. The M. Co. having made default in payment of the debentures, and the principal and interest secured thereby having become due, a scheme of arrangement was sanctioned by order of the court, under the Joint Stock Companies Arrangement Act, 1870, by which the plaintiffs were to have till 1900 to pay off the principal sums due by them, and in the meantime should pay interest at 4 per cent. The plaintiffs having, in pursuance of the scheme of arrangement, paid to the trustees for the debenture holders certain sums for interest, claimed to recover from the defendants the amount so claimed. It was held that the defendants were not liable, as the payment made by the plaintiffs was not under the policy, and, therefore, their liability as sureties had not arisen. It is settled that the creditor is entitled to recover loss actually sustained, although he may have entered into a compromise of the liability. This was determined in

Smith v. Compton (a), where it was held that, in an action on a general guarantee, the only effect of a party receiving the guarantee compromising a suit commenced against him without notice to the surety is to let in proof on his part, that the compromise was improvidently made, and it lies on him to establish that fact.

Liability of surety for incidental losses, &c.

The doctrine, that the principal is liable for what is *strictly* loss caused by the default guaranteed against, is also applied to what may, perhaps, be called *matters incidental* to the principal subject-matter of the guarantee (b).

For interest.

Thus, upon the one hand, whenever the principal debtor was liable to pay interest on what he owed the creditor, his surety is also liable, on his default, for interest. So, a party who guarantees the *due payment* of a bill of exchange (which is an instrument carrying interest by law) by the acceptor, is liable for interest upon it if it be not paid when due (c).

For sum paid in pursuance of a statute passed after guarantee given.

Where the defendant agreed to indemnify the plaintiff against all liability which he might incur in giving a certain bond to the Treasury, and the plaintiff, under a statute passed subsequently to the giving of the indemnity, made a payment to obtain the cancelling of the bond, it was held that such payment was covered by the indemnity of the defendants (d).

For costs incurred by creditor.

Upon the other hand, it sometimes happens that a person to whom a guarantee has been given incurs costs by reason of his having enforced or resisted legal proceedings. The question then arises, is the surety liable for such costs? Can their amount be recovered

(a) 3 B. & Ad. 407. See also *Lewis v. Smith*, 9 C. B. 610.

(b) For extent of liability of sureties on a *replevin* bond, see *Hefford v. Alger*, 1 Taunt. 218; *Hunt v. Round*, 2 Dowl. 558; *Ward v. Henley*, 1 Y. & J. 285; for liability of surety for a sheriff's officer, see *Farebrother v. Worsley*, 1 Tyr. 424; 5 C. & P. 102; 1 C. & J. 549.

(c) *Ackerman and others v. Ehrensperger*, 16 M. & W. 99.

(d) *Webster v. Petre*, 4 Ex. D. 127.

from him? Upon this point, in *Gillett v. Rippon* (e) Lord Tenterden, C.J., said: "A man has no right, merely because he has an indemnity, to defend an action and to put the person guaranteeing to useless expense" (f). And this principle was applied and acted upon in the case of *Colvin v. Buckle* (g). There, in consideration of a further advance by the plaintiffs to G., on his consignment, the defendants undertook to reimburse them the amount on demand, with interest, *in the event* of the plaintiffs finding it necessary to call upon the defendants to do so, either from the state of G.'s pending account with the plaintiffs, or from any other circumstances. On the arrival in England of the consignment on which the advances had been made, the East India Company sold the goods consigned, and out of it paid the freight, and in consequence of conflicting claims from the assignees of G. (for G. had become a bankrupt), filed an interpleader bill and paid the balance of the proceeds into court. Proceedings, at law and equity, were carried on between all the above parties, for several years, and ultimately the plaintiffs were obliged to pay the costs of the owner of the vessel. It was held that the defendants could not be made liable, under the guarantee, for the expenses incurred by the plaintiffs in the law proceedings.

A surety under a receiver's recognizance is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into court or account for (h). It has been held in *Ireland* that sureties for a land agent undertaking

(e) M. & M. 406; *Spark v. Heslop*, 1 El. & El. 563. And see *Caldbeck v. Boon*, 7 Ir. R. C. L. 32; *Howard v. Lovegrove*, L. R. 6 Ex. 43; *Baker v. Jarrett*, 3 Bing. 56.

(f) See also *Ronneberg v. Falkland Island Co.*, 17 C. B. (N.S.) 1; *Fisher v. Val de Travers Asphalte Paving Co.*, 1 C. P. D. 511; *Walker v. Hatton*, 10 M. & W. 249; *Smith v. Compton*, 3 B. & Ad. 407; *Dixon v. Fawcus*, 30 L. J. Q. B. 137.

(g) 8 M. & W. 680.

(h) *In re Graham, Graham v. Noakes*, (1895) 1 Ch. 66.

that he should duly account to his employer, were liable for the taxed costs of a cause petition to compel him to do so (a).

Credit must be given by creditor for sums paid by the principal debtor.

While the surety is thus held liable for all losses which are strictly losses arising from his principal's default, he, of course, cannot be held liable for anything beyond the actual and real extent of such losses. Consequently, the creditor is bound, in estimating the liability of the surety to him, to give the surety credit for what the principal debtor may have paid towards the liquidation of the amount due to the creditor. Thus, where the creditor, with the privity of the surety, accepts from the principal debtor a composition on the whole of the debt due, the surety is entitled to a proportional reduction of his own liability (b).

How long a guarantee continues in operation.

Necessary sometimes to determine whether guarantee continuing or not.

III. The third matter to be considered, in inquiring into the extent of the surety's liability, is the question, How long a guarantee continues in operation? It is sometimes by no means easy to determine what is the *extent, in point of time*, of the surety's liability. Thus, supposing goods to be supplied, or advances made to a third person, on the faith of a guarantee, the question often arises, Is the guarantee intended as a security for more than the *first* advance or supply? Is it a *continuing* guarantee or not?

Two classes of continuing guarantees.

The cases in which this question, whether a guarantee is a continuing one or not, most commonly arise, may be considered as being of two classes. The first class of cases consists of ordinary mercantile guarantees for a current account, either for goods sold, or for money advanced, or some consideration of the like nature. The second class of cases arises where guarantees have been given for the good behaviour of a person in some office or employment.

(a) *Greville v. Gunn*, 4 Ir. C. L. Rep. 201.

(b) See *Bardwell v. Lydall*, 7 Bing. 489. See also *Gee v. Pack*, 33 L. J. Q. B. 49.

With regard to the first class of cases, no fixed rules have been laid down for determining whether a guarantee is to be considered a continuing one or not. All, therefore, that can be done is to give a selection from some of the more important of the decided cases as they are found in the reports. In such cases the language of one guarantee affords little or no guide to the construction of another which is given under other and different circumstances (c). Probably this is the reason that no fixed rules are to be found with regard to them.

First class of continuing guarantees.

Ordinary mercantile guarantees.

In the following cases the instrument was in each case held to be a *continuing guarantee*.

Cases in which guarantee held to be continuing.
Laurie v. Scholefield.

In *Laurie v. Scholefield* (d), R. & Co. being about to open an account with the Union Bank, the defendant and one *Black* signed the following guarantee:—

“In consideration of the Union Bank agreeing to advance, and advancing, to R. & Co. any sum or sums of money they may require, during the next eighteen months, not exceeding in the whole 1,000*l.*, we hereby, jointly and severally, guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months.” 1,000*l.* was placed by the bank to the credit of R. & Co’s drawing account, and R. & Co. were debited with 1,000*l.* in a loan account. R. & Co. from time to time drew cheques against, and paid money to the credit of, their drawing account. Over 1,000*l.* was thus paid in by R. & Co., and they were not debtors on the drawing account when it was finally closed. The loan account remained unaltered. The bank sued the defendant for 1,000*l.* on the guarantee, and after the commencement of the action, *Black* paid the bank 500*l.* in discharge of his liability. The defendant did not plead this payment. It was held that the guarantee was a continuing one,

(c) *Per* BOVILL, C.J., in *Coles v. Pack*, L. R. 5 C. P. 65, 70.

(d) L. R. 4 C. P. 622.

and that the defendant's liability was not discharged by the payments made by R. & Co. It was held, also, that (by rule 14 of Hilary Term, 1853) the defendant could not, in the absence of a proper plea of payment, give the payment by *Black* in evidence in mitigation of damages; and that the bank was therefore entitled to recover the full amount claimed; but that the court, having power to amend the pleadings, would reduce the verdict by 500*l.* on payment by the defendant of the costs of the rule.

*Heffield v.
Meadows.*

In the case of *Heffield v. Meadows* (a), *W. York's* father failed in his business of a butcher, and was succeeded by his son, *W. York*, who had been supplied, from time to time, as his father had been, with stock, by the plaintiff, who was a grazier. At the time the guarantee was given, *W. York* owed the plaintiff 9*l.* 9*s.* 9*d.*, and wished to purchase from the plaintiff some stock for 91*l.* The plaintiff, not wishing to trust *W. York* to such an extent, went to the defendant and asked him to give him a guarantee, saying, that if he would give one for 50*l.* he would *still keep supplying W. York*, as he had supplied *York's* father. The defendant consented, and signed the following guarantee:—"50*l.* I, *John Meadows* (the defendant), of *Barwick*, in the county of *Northampton*, will be answerable for 50*l.* sterling, that *William York*, of *Stamford*, butcher, may buy of Mr. *John Sheffield* (the plaintiff), of *Donnington*." The defendant desired the plaintiff not to let *W. York* know that he had given this guarantee. The plaintiff delivered the stock to *W. York* accordingly. Payments were subsequently made by *W. York* to the plaintiff, to an amount exceeding 91*l.* It was held, that the surrounding circumstances showed that the object the parties had in view was to keep up *W. York* in his business of a butcher, and that, as the language of the

(a) L. R. 4 C. P. 595. But see *Walker v. Hardman*, 11 Cl. & F. 258; 11 Bligh, 299.

guarantee was general, and capable of meaning that the defendant intended to be answerable for goods, at any time supplied, to the extent of 50*l.*, it was a continuing guarantee. *Willes*, J., in his judgment, says:—"The question in this case is, whether the guarantee declared on was a continuing guarantee for 50*l.*, so as to be a security to the plaintiff to that extent for any balance which might become due to him in the course of his dealings with *York* (b), or whether the security was limited to a single transaction between the plaintiff and *York*. It is obvious that we cannot decide that question, upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that, for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee. Having done that, it will be proper to turn to the language of the guarantee to see if that language is capable of being construed so as to carry into effect that which appears to have been really the intention of both parties." And *Montague Smith*, J., in the same case, said: "The consideration is defectively stated. It does not show in what the supply is to consist. We may, therefore, look at the surrounding circumstances, in order to see *for what* it was given, and *to what* transactions or dealings it was intended to apply, *not to alter the language*, but to fill up the instrument where it is silent, and to apply it to the subject-matter to which the parties intended it to be applied."

In *Coles v. Pack* (c), in April, 1867, in order to induce *Coles v. Pack*

(b) The principal debtor.

(c) L. R. 5 C. P. 65.

the plaintiff to continue his dealings with one F., who was then largely indebted to him, the defendant gave the plaintiff a guarantee as follows:—

“Holborn Wharf, *Chatham*, April 3, 1867.

“Memorandum. In the event of your supplying *Mr. D. French*, of *Chatham*, any coals, during the next twelve months, from the 1st April last past, I do hereby guarantee the payment to you of the amount, for the time being, due from *Mr. D. French* to you, for coals sold by you to him. This guarantee to expire at the end of twelve months, viz., 1st April, 1868.

(Signed) “*T. H. Pack.*”

Before the expiration of the twelve months mentioned in the above guarantee, viz., on the 23rd of July, 1867, the debt due from F. to the plaintiff having greatly increased, and the plaintiff pressing for a settlement, the defendant gave him a further guarantee, as follows:

“*Ditton*, July 23rd, 1867.

“To *E. R. Coles*, Esq.

“Whereas *Mr. D. French*, of *Chatham*, *Kent*, coal merchant, is and stands indebted to you, the said *E. R. Coles*, in the sum of 2,205*l.* 3*s.* 9*d.*, upon an account this day stated and settled between you and the said *D. French*, in addition to his liability upon two certain acceptances of mine to his drafts, each for 750*l.*, dated 3rd July, 1867, and payable three and four months after date, and respectively indorsed to you by the said *D. French*: And whereas you are pressing for the immediate payment of the said sum of 2,205*l.* 3*s.* 9*d.*; Now, I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of, and agree to become responsible for, any sum of money for the time being due from the said *D. French* to you, whether in addition to the said sum of 2,205*l.* 3*s.* 9*d.* or no.

(Signed) “*T. H. Pack.*”

It was held that this was a *continuing* guarantee, unlimited both as to time and amount (a).

In *Burgess v. Eve* (b), a father, being desirous of obtaining advances for his son from a bank, gave the son a promissory note for 2,000*l.*, and gave the bank the following agreement under seal:—

“To *W. McKewan* and *W. J. Norfolk*, Esqrs., public officers of the *London and County Banking Company*.

“Gentlemen,—In consideration of your discounting for Mr. *William Henry Macers* my promissory note to him for 2,000*l.*, dated this day, and payable four months after date, and of the sum of 5*s.*, the receipt of which I hereby acknowledge, I deposit with you the several documents mentioned in the schedule hereunder written, which I agree shall remain with you, or other the public officers, for the time being, of the said company, as a security for the payment to you, or other such public officers as aforesaid, of all moneys due, or to become due, from him to the said company, of whatsoever members or proprietors it shall from time to time consist, on any account whatsoever, including charges for interest, commission, and all costs, charges and expenses which you may incur in enforcing or obtaining payment of such money, or in realizing this or any further security. And I agree to pay you, or such public officers aforesaid, upon demand, all such money. And I hereby charge the hereditaments and premises comprised in such documents respectively, and all fixtures now or hereafter therein, with the payment thereof.” It was held that this agreement was not limited to the 2,000*l.*, but was a continuing guarantee for all money already due, or which should become due from the son to the bank.

In the case of *Wood v. Priestner* (c), the guarantee

Wood v. Priestner.

(a) The able judgment of BOVILL, C.J., in this case is well worth perusing.

(b) L. R. 13 Eq. 450.

(c) L. R. 2 Exch. 66.

was as follows: "In consideration of the credit given by H. G. C. & Co. to my son, for the coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. & Co., whatever may be owing to an amount not exceeding the sum of 100*l.*" When the guarantee was given, the defendant's son owed the plaintiff a debt of more than 100*l.* for goods supplied. It was held to be a continuing guarantee. *Kelly*, C.B., in delivering judgment, said: "I think this is clearly a continuing guarantee. The question in these cases depends not merely on the words, but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction."

*Simpson v.
Manley.*

In *Simpson v. Manley* (a), the guarantee was as follows:—

"May 26th, 1830.

"Our relation, Mr. *Thomas Manley*, having intimated to us that he is about to make some purchases of goods from you, we beg to say, that if you give him *credit*, we will be responsible that his payments shall be regularly made to the extent of 1,000*l.*, from this period to the 1st of June, 1831."

It was admitted by counsel, and stated by the court, to be clear, that this was a continuing guarantee.

*Mason v.
Pritchard.*

In *Mason v. Pritchard* (b), it was held, that a guarantee by the defendant to the plaintiff "for any goods he *hath* or *may* supply W. P. with, to the amount of 100*l.*," is a continuing or standing guarantee to that extent for goods which may at any time have been supplied to W. P., until the credit was recalled, although goods to more than 100*l.* had been before supplied and

(a) 2 C. & J. 12.

(b) 12 East, 227. See observations on this case in *Melville v. Hayden*, B. & Ald. 593.

paid for. In *Allan v. Kenning* (c), the following *Allan v. Kenning.* guarantee was given: "Whereas W. C. is indebted to you in a sum of money, and may have occasion to make further purchases from you, as an inducement to you to *continue* your dealings with him, I undertake to guarantee you in the sum of 100*l.*, payable to you in default on the part of the said W. C. for two months." It was held to be a continuing guarantee, and that it was binding on the defendant till the parties came to an understanding that they would be off, and that, on default of W.C. for two months, the defendant would immediately be liable.

In *Bastow v. Bennett* (d), the guarantee was as *Bastow v. Bennett.* follows:—

"London, 7th March, 1810.

"I hereby undertake and engage to be answerable to the extent of 300*l.*, for any tallow or soap supplied by Mr. *Bastow* to *France & Bennett*, provided they shall neglect to pay in due time." It was held to be a continuing guarantee. Lord *Ellenborough*, in his judgment, says: "The defendant here became answerable for *any* soap or tallow supplied by the plaintiff to *France & Bennett*. Without the word *any* it might perhaps have been confined to one dealing to the amount of 300*l.*; but, as it is actually worded, I am of opinion it remained in force while the parties continued to deal on the footing established when it was given, but I think the goods supplied after the new arrangement (e) were not within the scope of the guarantee, and that the defendant is only answerable for the unsatisfied balance of the old account."

In *Merle v. Wells* (f), the guarantee was as follows:— *Merle v. Wells.*
 "Gentlemen,—I have been applied to by my brother

(c) 9 Bing. 618; 2 M. & Scott, 762.

(d) 3 Camp. 220.

(e) The new arrangement alluded to was one which *altered* the credit on which the plaintiff supplied the goods to *France & Bennett* substituting for a two months' credit, payment in ready money.

(f) 2 Camp. 413.

William Wells, jeweller, to be bound to you for any debts he may contract, not to exceed 100*l.* (with you), for goods necessary in his business as a jeweller. I have wrote to say by this declaration I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding 100*l.* after this date.

“(Signed) *John Wells.*”

It was held to be a continuing guarantee. Lord *Ellenborough*, in his judgment, said: “I think the defendant was answerable for any debt, not exceeding 100*l.*, which *William Wells* might from time to time contract with the plaintiffs in the way of his business. The guarantee is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so.”

Martin v.
Wright.

In *Martin v. Wright* (a), the guarantee was as follows:—“In consideration of your agreeing to supply goods to K., at two month’s credit, I agree to guarantee his present or any future debt with you to the amount of 60*l.* Should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days of receiving notice from you.” It was held that this was a continuing guarantee.

Nottingham
Hide, &c. Co.
Limited v.
Bottrill.

In the *Nottingham Hide, Skin, and Fat Market Co. (Limited) v. John Bottrill and another* (b), the facts were as follows: The plaintiffs were in the habit of holding weekly sales of hides, skins, &c., the course of business being that the goods bought at each sale were paid for in the following week. One *Dyson*, who had for some time bought skins at these sales, on the 29th of December, 1871, bought to the extent of 34*l.* 7*s.* 6*d.* Having heard that *Dyson* had executed a bill of sale, the plaintiffs declined to deliver the skins unless the defendants would engage to be responsible for the price.

(a) 6 Q. B. 917.

(b) L. R. 8 C. P. 694.

This being communicated by *Dyson* to the defendants, the latter, on the 1st of January, 1872, telegraphed to the plaintiffs, "We agree to be answerable for the skins," and on the same day sent them a covering letter, in which, after stating that they had had dealings with *Dyson* for five years, and had never known anything dishonourable or dishonest in any of his transactions, they wrote, "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you; and when to the contrary we will write you." The plaintiffs accordingly sent *Dyson* the goods, and continued to deal with him down to the 3rd of May, 1872, at which time he was indebted to them in 92*l.* 1*s.* 10*d.*, which he was unable to pay, the defendants, who were the holders of the bill of sale, having seized and sold all his effects under it. It was held that the defendants' letter of the 1st of January was a continuing guarantee. In his judgment in this case, *Keating, J.*, said: "Each case must, no doubt, depend entirely upon the language used, and the document must be looked at with reference to the special circumstances under which it is given. Now, what did the writers of that letter of the 1st January mean, and what would the plaintiffs naturally understand from it? The defendants were aware of the state of things between the plaintiffs and *Dyson*, and sent that letter in order to remove the unfavourable impression the plaintiffs had of *Dyson's* credit and ability. The letter does not confine itself to the transaction alluded to in the telegram; but it goes on—'Having every confidence in him, he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you; and when to the contrary we will write you.' What would any man of business understand by that?

The only reasonable construction of the letter, as it strikes me, is this: Our opinion of *Dyson* is so high, that we are ready to become sureties for any account for which he may become indebted to you: and, if we see reason to change our mind, we will let you know. That amounts to a guarantee, and a continuing guarantee. It was calculated to induce the plaintiffs to give credit to a man to whom they would not otherwise have given it" (a).

*Mayer v.
Isaac.*

In *Mayer v. Isaac* (b), the guarantee was as follows: "In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof to the amount of 200*l*." It was held that the guarantee was a continuing one, and that the defendant was liable upon it, although, after the guarantee, goods to a greater amount than 200*l*. had been supplied to and paid for by V. "It contemplates" (says Baron *Alderson* in his judgment in this case) "the continuance of a supply on the one side, and on the other, a liability for any default during that supply, and then it defines the extent to which the defendant will be bound upon this continuing or running guarantee" (c).

Cases in
which
guarantee
held not to be
continuing.

*Walker v.
Hardman.*

The following cases have been selected as instances of instruments which have been held *not* to be *continuing guarantees*:—

In *Walker v. Hardman* (d) it was laid down by the House of Lords that where a bond, which, on the face of it, appears to be a simple money bond, is given to

(a) The judgment of BRETT, J., in this case will also well repay perusal.

(b) 6 M. & W. 605.

(c) For other instances of continuing guarantees, see *Tanner v. Moore*, 9 Q. B. 1; *Hargreave v. Smee*, 6 Bing. 244; *Williams v. Rawlinson*, 3 Bing. 71; *Hitchcock v. Humphrey*, 5 M. & G. 559; *Henniker v. Wigg*, 4 Q. B. 792. See also *Woolley v. Jennings*, 5 B. & C. 165; *Hoad v. Grace*, 7 H. & N. 494; *In re Booth, Browning v. Baldwin*, 40 L. T. R. 248; 27 W. R. 644; *Horlor v. Carpenter*, 3 C. B. (N.S.) 172.

(d) 11 Cl. & F. 258; 11 Bligh, 299.

secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not to cover floating balances.

In *Nicholson v. Paget* (e), the guarantee was in the following words:— *Nicholson v. Paget.*

“Sir,—I hereby agree to be answerable for the payment of 50*l.* for *T. Lerigo*, in case *T. Lerigo* does not pay for the gin, etc., which he receives from you, and I will pay the amount.” It was held that this was *not* a continuing guarantee, for that it referred to a particular quantity of gin which the party was to receive from the plaintiff.

In *Tayleur v. Wildin* (f) one M., being yearly tenant to the plaintiff on the terms of a written agreement, the defendant, in consideration of the plaintiff's continuing M. as such tenant, gave the plaintiff a guarantee for “the rent of the Leese Farm, in the occupation of M.” The plaintiff afterwards gave M. notice to quit, but, on the payment of arrears of rent, withdrew it before the expiration of the current year. The next year the rent became in arrear, and the plaintiff sued the defendant on his guarantee. It was held that the old tenancy was determined by the notice to quit; that the guarantee applied only to the tenancy which existed at the time when it was given; and that the defendant was, therefore, not liable. *Tayleur v. Wildin.*

In *Chalmers v. Victors* (g), the defendant gave the following guarantee:—“J. V. hereby engages to be responsible for liabilities incurred by M. and V. to the extent of 50*l.*” At the time the guarantee was given, 41*l.* was due from M. and V. to the plaintiffs. It was held that the guarantee contemplated future credit, but only to such an amount as, with the existing liability, *Chalmers v. Victors.*

(e) 1 C. & M. 48.

(f) L. R. 3 Ex. 303. See *Holne v. Brumskill*, 3 Q. B. D. 495; *Baynton v. Morgan*, 21 Q. B. D. 101.

(g) 16 W. R. 1046.

made up 50*l.*, and that amount having been paid off by M. and V., it was held that the guarantee did not cover goods subsequently supplied. *Bovill*, C.J., in his judgment in this case, says: "It is difficult, if not impossible, to reconcile all the cases cited. The documents in them vary from each other, and the document in the present case varies from all those that have been cited. Taking the documents simply without reference to the surrounding circumstances, and reading it in the ordinary sense, it would apply only to past liabilities, and if there were nothing further, the guarantee would be altogether bad, but we are at liberty to look at the facts as they were on the day when the guarantee was given." *Byles*, J., in the same case, said: "The words of this guarantee are 'for liabilities incurred,' and we are to give it a literal construction, unless that would lead to an absurdity, or something plainly alien to the intention of the parties. . . . We are asked to extend the words as if they were 'incurred or to be incurred;' but we cannot do so without manifest reason, especially in the case of a surety."

In *Allnutt v. Ashenden* (a), the guarantee given to the plaintiff was as follows:—

"Messrs. *Allnutt & Arbouin*, 50, Mark Lane.

"Sirs,—I hereby guarantee Mr. *John Jennings's* account with you for wines and spirits to the amount of 100*l.*

"(Signed) *E. Ashenden.*

"*Sittingbourne*, April 14, 1838."

At the time of the giving of such guarantee there was an existing account between *Jennings* and the plaintiff, upon which the former was indebted to the latter (though in a less sum than 100*l.*). It was held, that the guarantee was for the payment of such existing account, and that it did not extend to future supplies of

goods. "The document," said *Erskine*, J., in his judgment in this case, "contains no express words which point to any prospective supply of goods, *neither* does anything appear from which it can be inferred that the parties contemplated any such supply. The primary meaning of the language used can only have reference to an existing account."

In *Bovill v. Turner* (b), the guarantee was as follows:—*Bovill v. Turner.*
 "You may let L. have coals to 50*l.*, for which I will be answerable at any time." Coals were supplied for many years, and many were from time to time delivered and paid for, but ultimately more than the sum of 50*l.* was in arrear. It was held that the surety had not given a continuing guarantee.

In *Melville v. Hayden* (c), the guarantee was as follows:—"Memorandum, 23rd September, 1818. I *Melville v. Hayden.*
 engage to guarantee the payment of Mr. *Amos Moulden* to the extent of 60*l.*, at quarterly account, bill two months, for goods to be purchased by him of *William and David Melville*." It was held that this was *not* a continuing guarantee for goods to be at any time supplied. *Bayley*, J., in his judgment in this case, said: "The words 'quarterly account' do not seem to me to vary the case, they only mean that, at whatever time the goods might have been delivered, the account for them should be rendered quarterly. A party who takes a guarantee of this sort should carefully provide that there are words in it expressive of its being a guarantee of goods to be furnished by him from time to time. In the case of *Mason v. Pritchard* (d) that was the case. The words there were 'for any goods he hath or

(b) 2 Chit. 205.

(c) 3 B. & Ald. 593.

(d) 12 East, 227; *ante*, p. 200. This case decides that a guarantee by the defendant to the plaintiff "for any goods he *hath* or *may* supply W. P. with, to the amount of 100*l.*," is a continuing or standing guarantee to that extent for goods which may at any time have been supplied to W. P. until the credit was recalled, although goods to more than 100*l.* had been before supplied and paid for.

may supply,' so that there the guarantee was applicable to any goods furnished at any time to the amount of 100*l.*, whatever intervening payments might have taken place. They were, therefore, equivalent to the words 'any goods furnished from time to time.' In this case, however, I think there was no continuing guarantee" In the same case *Best*, J., said: "I think the case of *Mason v. Pritchard* went as far as possible, but that case is distinguishable from the present."

Kirby v.
Duke of
Marlborough.

In *Kirby v. The Duke of Marlborough* (a), it was held, that a bond entered into by A. and B. to the plaintiffs to enable A. to carry on his trade, conditioned for the payment of all such sums not exceeding 3,000*l.*, which should at any time thereafter be advanced by plaintiffs to A., is not a continuing guarantee to the extent of 3,000*l.* for advances made at any time, but only a guarantee for advances once made to the extent of 3,000*l.*

Kay v.
Groves.

In *Kay v. Groves* (b), the guarantee was as follows:—

"I hereby agree to be answerable to Mr. *Kay* for the amount of five sacks of flour, to be delivered to Mr. *W. Taylor, Gray's Inn Lane Road*, payable in one month.

"November 18th, 1828. *Thomas Groves.*"

This was held to be a guarantee for flour not exceeding five sacks, delivered at one time, within a month from 19th November, and not a continuing guarantee for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks. It appeared at the trial before *Tindal*, C.J., that on the 19th November plaintiff delivered to *Taylor* five sacks of flour, and on the 21st November five more. On the 24th, *Taylor* sent back three and a half sacks out of the first five, as being of a bad quality; and three and a half other sacks were supplied that day. The defendant paid into court the price of a sack and a half of flour. Chief Justice *Tindal* observing, that plaintiff had proved

(a) 2 M. & S. 18.

(b) 6 Bing. 276.

no second order from the defendant, nor any agreement on his part that three and a half sacks should be substituted on the 24th November, for three and a half delivered on the 19th, and to be paid for within a month from that day, left it to the jury to say whether the delivery on the 24th was made under the defendant's guarantee, and in substitution of any part of the delivery on the 19th, or whether it was made under a new contract. Verdict for defendant.

The *second* class of cases in which the question, how long a guarantee continues in operation, usually becomes important, consists of those cases in which a guarantee has been given for the fidelity of a person in some office or employment (c). Second class of continuing guarantees.

Where a bond or other guarantee has been given for the good behaviour of third persons in offices or employments, very nice questions often arise as to whether the liability of the surety continues after some change has taken place as to the circumstances of the appointment; but (unlike the cases of mercantile guarantees), certain fixed rules appear now to be laid down for the determination of all such questions. We will, therefore, proceed to discuss in order— Bonds given for fidelity of official persons.

Rules for determining duration of surety's liability in such cases.

- (1) The liability of the surety after the third person's *reappointment* to the *same* office (p. 258);
- (2) The surety's liability after the third person's appointment to another, though *similar* office or employment (p. 264);
- (3) The surety's liability after *a change* has taken place *in the duties* or length of term of the third person's office (p. 268).

These cases will exemplify the rule that a surety's liability is not to be extended beyond the precise terms of his engagement. In determining the extent of this

(c) It has recently been held that a "guarantee society" may be accepted as surety to a bond given by an administrator pending suit, even though the directors do not by the bond render themselves personally liable: *Carpenter v. Solicitor to the Treasury*, 7 P. D. 235.

liability under a surety bond, it must be borne in mind that the words of the *condition* of the bond are to be restrained by the *recitals*.

Cases where, after guarantee given, the third person is re-appointed to same office.
Rule applicable to such cases.

(1.)—Let us consider those cases where, subsequently to the execution of the surety bond, the third person for whom the surety has agreed to be answerable is re-appointed to the *same* office which he filled at the time of the execution of the bond. To such cases the rule applicable appears to be, that, though the words of the condition of the bond be *general* and *indefinite* as to the time during which the surety is to remain liable, yet such liability is not to extend beyond the time for which the office *recited* in the condition is limited to be holden, because such a construction is most agreeable to the intent of the condition. Moreover, it appears from the reported cases that even where the recital in the condition of the bond does not state the office to be for a *specific time*, yet, if this be shown by the pleadings to be the case, the liability of the surety must be confined to such specific time (*a*). We will now illustrate what we have just stated by one or two examples.

Lord
Arlington v.
Merrick.

In the celebrated case of *Lord Arlington v. Merricke* (*b*), the bond was conditioned for the performance of the duties of deputy postmaster, by A. B., “*for and during all the time that he shall continue deputy postmaster of the said stage.*” It appeared, however, from a recital in the bond, that the plaintiff had appointed A. B. to act as deputy postmaster *for the term of six months*. It was accordingly held, that the general words of the condition was restrained by this recital, and that therefore the liability of the defendant under the bond

(*a*) In a recent *American* case it was held that a surety on the bond of a re-elected county treasurer is liable only for default during the term for which the bond was given: *Van Sickle v. County of Buffalo*, 42 Amer. R. 753 (U. S.).

(*b*) 2 Wms. Saund. 813. See also *Liverpool Waterworks Co. v. Atkinson*, 6 East, 507.

as surety for A. B., endured only during the six months recited in the bond. and did not extend to subsequent re-appointments to the same office.

In *Bamford v. Iles* (c), a bond reciting that A. was appointed assistant overseer of the parish of M. was conditioned for the due performance of his duties "thenceforth from time to time, and at all times, so long as he should continue in such office." Before the date of this bond, namely, on the 25th June, 1840, a vestry meeting was held at which A. was elected assistant overseer until the 25th March, 1841, at a salary of 8*d.* in the pound on some sums collected, and 4*d.* on others. On the 9th July, 1840, the justices by their warrant, which recited the resolution of the vestry electing A. at the aforesaid salary, appointed A. assistant overseer in pursuance of 59 Geo. 3, c. 12. On the 25th March, 1841, he was again elected to the same office, at a salary of 50*l.* per annum, and was re-appointed by the justices, and continued to be so re-elected and re-appointed by the justices till March, 1846. On ceasing to hold office he retained moneys in his hands. It was held that the sureties were not liable on the bond. *Bamford v. Iles.*

In *Peppin v. Cooper* (d), a bond was given which, after reciting the appointment of Henry Warren to be a collector, under an Act of Parliament which made the office an annual one, was conditioned for the due collection by Henry Warren of the rates and duties "at all times hereafter;" and it was holden that the due collection of the rates for one year was a compliance with the condition *Peppin v. Cooper.*

(c) 3 Exch. 380; *Kitson v. Julian*, 4 Ell. & Bl. 854; *Munford v. Rice*, 6 Munf. (Va) 81. It appears, however, from the case of *Frank v. Edwards*, 8 Exch. 214, that a mere reduction of salary, where the original appointment is not revoked, will not discharge the surety unless indeed the bond contain a stipulation to that effect. See the judgment of PARKE, B., in this case, where the distinction between it and *Bamford v. Iles*, *supra*, is pointed out.

(d) 2 B. & Ald. 431.

of the bond. *Abbott*, C.J., said, "I am of opinion that the condition of the bond is satisfied by the faithful collection of rates and duties for the space of one year. It is true that the words '*at all times hereafter*,' in the condition of the bond, would, taken by themselves, extend the liability of the surety beyond that period. But these words must be construed with reference to the recital, and to the nature of the appointment there mentioned, and the recital is, that *Warren*, together with *Peppin*, had been appointed collectors under the said Act of Parliament. Now, the nature and duration of that office must be learnt from the Act of Parliament itself; for if the statute make it an annual office, it is unnecessary to state that fact either in the bond or in pleading" (a).

In the three following cases the recitals of the bonds did not indeed state the office to be holden for a *specific time*, but, as this appeared from the pleadings, it was held that this was sufficient to control the general and indefinite language of the conditions of the bonds.

Kitson v.
Julian.

In *Kitson v. Julian* (b), the condition of the bond was that the principal should "from time to time and at all times, so long as he shall continue to hold the said office or employment," faithfully and diligently demean and conduct himself therein. This bond was afterwards put in suit against the surety, who pleaded that the appointment to the office in question was for one year only, and that no default had happened within the year. Replication that by consent of all parties the principal was retained longer than a year. *Held*, that the replication was bad, for that it did not show more than a fresh appointment by parol, which would not be comprehended in the condition of the bond.

(a) And see *Savings Bank of Hannibal v. Hunt*, 37 Amer. R. 449 (U. S.).

(b) 4 Ell. & Bl. 854; and see *Bamford v. Iles*, *ante*, p. 259.

In *Hassell v. Long* (c), a bond was given by the defendant's testator as surety for E. The condition of the bond recited that E. had been, and still was, collector of the land tax, and all other taxes and duties imposed by several Acts of Parliament on the inhabitants of the parish of C., by means whereof he received from the inhabitants divers sums of money. The condition, in its operative part, depended on the due payment by E. from time to time, and at all times thereafter, to the Receiver-General of Taxes, etc., all and every sum which he (E.) should from time to time collect and receive from the inhabitants of the parish, for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any Act of Parliament. It was held that this bond was confined to the current year for which E. was, at the date of the bond, collector, although it did not appear on the condition that he was only appointed for a year: it being shown, *by the defendant's plea*, that the said office of collector was an annual one, and held as such by E. at the date of the bond (d).

In *The Wardens of St. Saviour's, Southwark, v. Bostock* (e), A., B., and C. entered into a bond, as sureties for D. and E. The condition of the bond recited that D. was, on a certain day, appointed collector of the church rate of the parish of St. Saviour's, Southwark, by virtue of which office he was empowered to collect and receive all such moneys as were rated and assessed on the inhabitants by virtue of the said rate, and for which he was accountable to the wardens of the grand account. It bound the sureties that D. should duly account for all moneys collected or

(c) 2 M. & Selw. 362. See also *Wardens of St. Saviour's v. Bostock*, 2 N. R. 175, *infra*.

(d) See, further, as to alleging in the defendant's pleading that the office is limited in duration, the cases of *Curling v. Chalklen*, 3 M. & S. 502, and *Leadley v. Evans*, 2 Bing. 32.

(e) 2 N. R. 175.

received by him, on account of the above rate, and also on every other rate or rates thereafter to be made and collected by him, the said D. It being *admitted by the replication* that the office was an annual one, it was held that the sureties were only answerable for D. in that single appointment, and not on his appointment in the ensuing year.

Sometimes liability of surety is co-extensive with duration of third person's office.

Where, however, it does not appear from the recital of the bond itself, or in any other way, that the office, for the due fulfilment of which another is surety, is limited in duration, then, there being nothing to control the general and indefinite language of the condition of the bond, the liability of the surety is co-extensive in duration with the length of the third person's office.

Mayor of Birmingham v. Wright.

Thus, in the case of *The Mayor of Birmingham v. Wright* (a), certain parties had become sureties by bond. The bond recited that R. had been appointed to act as overseer for making and levying borough rates in that part of the parish, A., which lay within the borough of B., during the pleasure of the council of the borough. It was conditioned for performance of the duties during such time as A. should act as overseer. Upon this bond it was held, that the sureties were liable beyond the expiration of the year, A. continuing in office; for that there was no law limiting the duration of the office to a year, so as to control the express stipulations of the bond.

Curling v. Chalklen.

In *Curling v. Chalklen* (b), debt was brought on a bond made by one *Chalklen* and his sureties. The condition recited the statute 27 Geo. 2, c. 38, and that *Chalklen* (four years before the date of the bond) was appointed by the churchwardens and parishioners of *Deptford*, in pursuance of the statute, collector of the

(a) 16 Q. B. 623. See also *Sansom v. Bell*, 2 Camp. 39.

(b) 3 M. & S. 502.

poor rates *to be levied and raised* in the parish. And the condition itself was that *Chalklen* should account, as often as required, for all moneys *so collected and received by him, by virtue of the Act*, etc. The breach alleged was not accounting for moneys collected and received by *Chalken* before the making of the bond.

The defendant pleaded, *first*, that C. accounted for all the moneys collected and received by him before the making of the bond; *secondly*, that the office of collector is an annual office, and that C. accounted for all the moneys collected and received by him within the current year of office in which the bond was made. Upon demurrer, it was held that both the pleas were ill, for by the words of the statute, the appointment was prospective, to collect future rates, and not retrospective only, and the condition was in the words of the statute, without any restraining words; and it was not pleaded that the office was an annual office at the time of making the bond, and if it had been, yet it appeared by the statute not to be an annual office, though concerning rates which are raised in the course of the year. Lord *Ellenborough*, C.J., in his judgment in this case, said: "Here is a duty, not limited by the Act to a year, so that it shall extend to that period and no longer, but a continuing duty on the party so long as he shall remain collector, without regard to any definite time, though it may be that the rates which he is to collect are, in form, limited to a less or not a greater period than a year. It appears, then, that there is nothing on the face of the Act of Parliament, nor of the condition, directly or indirectly, to limit the period of office to a year. Therefore, the obligation of the surety cannot be so narrowed; it is indefinite in its language relating to a period before or after. As to the allegation in the plea that this is an annual office, I consider that as impertinent. The allegation should have been, that it was an annual office at the time

when the obligation was made; but that would not have been supported by the Act."

Sometimes, by express agreement, surety's liability does not terminate on subsequent re-appointment of third party to same office.

Augero v. Keen.

Of course, by the use of proper words, a surety may provide for a *continuance* of his liability, on subsequent re-appointments to the same office, of the person whose default or miscarriage is guaranteed against. Thus, in *Augero v. Keen (a)*, a bond given to secure the faithful performance of the office of a collector of parochial rates (who was by Act of Parliament to be appointed by trustees for a year, and then to be capable of re-election) was *conditioned* that "from time to time, and at all times thereafter, during such time as he should continue in his *said* office, whether by virtue of his *said* appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority of the *said* trustees, or their successors, to be elected in the manner directed by the *said* Act, he should use his best endeavours to collect the moneys received by means of the rates in the then present or in any subsequent year," etc., etc. It was held, that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed. Lord *Abinger*, C.B., in giving judgment in this case, said: "It would be difficult to find any words more clear than those employed in this case to show that the parties meant to provide for the continuance of the party in office. In order to save expense, as long as he continues in office under his original appointment, or any continuing re-appointment, only one bond is to be required."

Where, after surety bond given, third person

(2.)—We now come to cases where, after the execution of the surety bond, the third person has been appointed to *another*, though *similar* office (*b*). An

(a) 1 M. & W. 390.

(b) These cases *might* certainly not improperly be discussed with the cases which we shall next discuss, and which they *to a certain extent*

instance of this kind is furnished by the case of *The Guardians of the Portsea Island Union v. Whillier* (c). In that case a bond, dated the 16th December, 1852, recited an order of the Poor Law Commissioners in 1836, by which it was ordered that the plaintiffs (guardians of the *Portsea Union*) should appoint one or more fit and proper persons to be the collector or collectors of the poor rates of such of the parishes as the guardians might deem to require a collector, and that every person appointed a collector should give security for the due discharge of the duties of the office, and further recited that W. was duly appointed to be a collector under the said order. The bond was then conditioned (among other things) that W. should, during his continuance in his said office, and whether the district for which he was appointed were or were not changed, faithfully discharge the duties thereof, and obey the lawful directions of the guardians. In the first instance the guardians had elected three persons to be collectors of the poor rate in *Portsea*, to each of whom was assigned a portion of the parish. In 1848 the guardians had divided the parish into four districts for collection of the poor rates, and appointed an additional collector. After the passing of statute 13 & 14 Vict. c. 99, it was determined to appoint a fifth collector. At this time one of the four collectors resigned, and an advertisement was published stating that the guardians would appoint "two persons to be collectors of the poor rates of the parish of *Portsea*, to one of whom would be assigned a collection of such rates from the owners of small tenements." W. had applied, offering himself as a candidate for one of them, and had been elected for the purpose of collecting the rates from the owners of small tenements. It is, however, thought desirable, in order to prevent all possible confusion, to treat them separately.

ments. The bond mentioned above was then executed by the defendant *Whillier*, and as W.'s surety. Some years after the execution of the bond, in the year 1855, one of the collectors having resigned, W. applied to the plaintiffs, to transfer him to that district, which application was acceded to. In an action upon this bond it was held, that the appointment of *Whillier* was a general one as collector of poor rates for the parish, and that there being only a change of duties in 1855, the obligation of the surety was not discharged.

Holland v.
Lea.

In *Holland v. Lea* (a) the facts are as follows:—In March, 1845, R. L. was nominated and elected assistant overseer of the poor of the parish of W. by the inhabitants in vestry assembled, at the yearly salary of 27*l.* In May following he entered into a bond, with two sureties, for the faithful execution of the office, under the 59 Geo. 3, c. 12. The condition of the bond recited that statute, and that R. L. had been duly nominated and elected at the annual salary of 27*l.* R. L. then proceeded to perform the duties of the office. In March, 1846, at a vestry duly held, a resolution was come to, that the permanent overseer's salary (meaning R. L.'s) should be raised from 27*l.* to 35*l.* a year, including all other extra charges. In June, 1846, a warrant of the appointment of R. L. as assistant overseer was signed and sealed by two justices of the peace. This warrant recited that R. L. had been nominated and elected in March, 1846, at the yearly salary of 35*l.* Subsequently to June, 1846, R. L. had acted as assistant overseer, but had become a defaulter to a considerable amount. In an action on the bond by the succeeding overseers against the sureties, it was held (*Pollock*, C.B., *Parke*, B., and *Alderson*, B., *Martin*, B., diss.), that R. L. had never been duly appointed assistant overseer, and that the sureties were not liable.

(a) 9 Ex. 430.

It seems that where a person is surety for another's good behaviour in a particular office, and subsequently such other person is appointed to a perfectly distinct office, which is *incompatible* and *inconsistent* with (b) the first appointment, the surety is discharged; even though the duties under the two appointments be substantially identical. This was decided in the case of *The Malling Union v. Graham* (c). There A., in 1865, was duly appointed by a vestry of the parish of Malling assistant overseer of the said parish at a fixed salary. This appointment was made in pursuance of 59 Geo. 3, c. 12, s. 7 (d). B. became A.'s surety. Subsequently under 7 & 8 Vict. c. 101, s. 62 (e), A. was appointed by a board of guardians of a union, on the recommendation of the vestry of the parish of West Malling, collector of poor rates for the said parish, at a poundage of 6d. The Poor Law Board duly confirmed this appointment. The duties under the two appointments were substantially the same. After the last appointment A. continued to perform the same duties as he had before performed, and the appointment of 1865 was not otherwise resigned or revoked. A. having made default after the last appointment in keeping books and in paying over money, B. (the defendant) was sued on the bond.

Subsequent appointment of third party to distinct office which is inconsistent with first appointment discharges surety.

Malling Union v. Graham.

(b) *Worth v. Newton*, 10 Ex. 247.

(c) L. R. 5 C. P. 201.

(d) This enactment in substance provides, that the inhabitants of a parish in vestry assembled may elect, and that two justices of the peace may appoint, assistant overseers with a salary; and that the person so appointed assistant overseer shall continue in such office until he shall resign the same, or until revocation of his appointment by the vestry.

(e) This enactment in substance provides that the Poor Law Commissioners, on the application of the board of guardians of any parish or union, may direct the appointment of a paid collector of poor rates. And all powers of the inhabitants of any parish in vestry assembled, or of justices of the peace, of any persons other than the board of guardians of such parish or union, to appoint any collector for any such parish as aforesaid, and (except when otherwise directed by the commissioners) all appointments under such powers shall cease.

It was held, that the two appointments were inconsistent and incompatible: that the appointment of 1865 ceased by virtue of 7 & 8 Vict. c. 101, s. 62, on A.'s acceptance of the appointment by the guardians, and consequently that the liability of B., as surety on the bond, was at an end. It would *seem* that there was, under the circumstances, both a revocation of the first appointment by the vestry and a resignation by A.

Aliter, where the two offices are not inconsistent.

Where a person, for whose good behaviour another is surety, is, subsequently to the execution of the surety bond, appointed to an *additional* office or employment, the liability of the surety does not in consequence necessarily cease (a). Of course, however, in such a case the liability of the surety would not extend to anything done or omitted by the principal in respect to such *additional* office or employment.

In a recent *American* case it was held that sureties for the faithful performance of the duties of the book-keeper of a bank are liable for his errors in that capacity, although he also performs the duties of teller, unless the errors were connected with or induced by the latter employment (b).

Subsequent alteration in duties or duration of third party's office.

(3).—We come to those cases where, after the execution of the surety bond, a change has taken place in the duties or length of term of the third person's office or employment, or in the mode of remunerating such third person for his services.

Material alteration in duties of the office discharges the surety.

It seems to be well established that, where the change made *materially* alters the duties of the office, and this affects the peril of the sureties, they are released from liability.

Pybus v. Gibb.

Thus, in the case of *Pybus v. Gibb* (c), sureties gave a bond to the high bailiff of a county court, conditioned

(a) *Skillett v. Fletcher*, L. R. 2 C. P. 469; *S. C.* 1 C. P. 217; *Worth v. Newton*, 10 Ex. 247.

(b) *Home Savings Bank v. Traube*, 42 Amer. R. 402 (U. S.).

(c) 6 E. & B. 902.

for the good behaviour in his office of one of the bailiffs appointed by the high bailiff. After the execution of the bond, and before the breach of the duty complained of, several Acts of Parliament came into operation which *materially* altered the nature of the office of bailiff. It was held, that the surety was discharged, even *though the misconduct of the bailiff was in a matter not altered by the said Acts of Parliament.*

So, also, in *Bartlett v. The Att.-Gen.* (d), one *Clarke*, *Bartlett v. The Att.-Gen.* in 1691, was made collector of customs in the port of *Boston*; *Bartlett* and others were security for him. In 1698 (e), the duties were granted upon coals, &c., which by the statute were to be under the management of the commissioners of the customs, and several clauses for that purpose were contained in the Act. The commissioners gave *Clarke* a deputation for that purpose, and took security. Afterwards *Clarke* died; the customs were paid; but on this new coal duty 1,000*l.* remained unpaid; upon which the bond was put in suit against *Bartlett*, the widow and executrix of *Bartlett*, the surety, and she brought her bill, and the question was, whether the bond in which *Bartlett* became surety extended to this future duty on coals. After adjournment, the barons delivered their opinions *seriatim*, and unanimously held, that the said bond did not extend to the future duty on coals, and that the plaintiff ought to be relieved; and accordingly ordered a perpetual stay of process on the said bond.

Another case which depends on the same principle is *Bonar v. Macdonald* (f). There A. became surety, by *Bonar v. Macdonald.* bond, for B's conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to the new situation. B. afterwards, while remaining in the same situation, undertook on having his salary

(d) *Parker's Reports*, 277.

(e) 10 Will. 3.

(f) 3 H. L. C. 226.

raised, to become liable to one-fourth of the losses on discounts. No communication of this new arrangement was made to A. B. allowed a customer considerably to overdraw his account, and thereby the bank lost a sum of money. It was held, that the surety could not be called on to make good the loss, though it fell within the terms of the original agreement, as the fresh agreement was the substitution of a new agreement for the former one, and A. was thereby discharged.

*Napier v.
Bruce.*

It appears, too, that in construing an agreement in the form of a bond in which a surety becomes liable for the due fulfilment of an agent's duties, therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses, specifying the extent of the agency. It was held, accordingly, in *Napier v. Bruce* (a) (affirming the judgment of the Court of Session), that moneys received by an agent on account of his employers, during the time of his agency, but not in pursuance of the particular agency disclosed to the surety by the specified conditions in the bond, were not covered by the surety's obligation "that during the whole time the said J. D. B. (the agent) shall continue to act as agent aforesaid, in consequence of the above-recited agreement, he shall well and truly account for and pay to us (the employers) all sums of money received by him on our account."

If a material change in the duties of the principal were relied on as a defence, such change must formerly have been clearly and distinctly alleged by the defendant in his plea. Thus, for instance, where the defendant became surety for G., so long as he continued in that service of the bank, and at the time the guarantee was given G. was *clerk* to the bank: it was held, that a *plea* stating that G. had, subsequently

(a) 8 C. & F. 470.

to the execution of the guarantee, been appointed *manager* of the bank was bad, as not showing conclusively that G. had ceased to be *clerk* when he became *manager* (b).

Where, however, the change made in the duration of the office does *not materially* alter the duties, or is *contemplated* by the parties, the bond is not avoided.

In *Oswald v. The Mayor of Berwick* (c), A. was appointed treasurer to the corporation of Berwick, the office being then an annual one. On his appointment A. gave a bond with sureties conditioned for the due accounting of all such moneys as he should or might recover or receive "in virtue of . . . the said appointment as treasurer, as aforesaid, during the whole time of . . . continuing in said office, in consequence of the said election, or under any annual or other *future* election of the said council to the said office." Afterwards, and during the year, the term of office was by statute changed to a holding "during the pleasure of the council for the time being." At the expiration of the year A. was re-appointed treasurer and continued in office a long time. Held, that his sureties were liable for A.'s defaults happening *after* the first year.

So, too, in the case of *Frank v. Edwards* (d), the bond was conditioned that T. R. should from time to time, and at all times thereafter during the continuance of his said appointment, faithfully account for the

Immaterial or contemplated alteration in tenure or duties of office does not discharge the surety.

Oswald v. Mayor of Berwick.

Frank v. Edwards.

(b) *Anderson v. Thornton*, 3 Q. B. 271.

(c) 5 H. L. C. 856; *Mayor of Berwick v. Oswald*, 1 E. & B. 295; 6 E. & B. 695. This case is cited in 2 Jur. (N.S.) 743, as *Dobie v. The Mayor of Berwick*. There were, in fact, three actions in the court below, and three writs of error in the House of Lords. The first of these writs were brought in the name *Dobie v. Mayor of Berwick*, and under that name the case was argued. The other cases, involving precisely the same point, were made to depend on the decision of the first. See note (a) 5 H. L. C. 856. In the *Mayor of Dartmouth v. Silly*, 7 E. & B. 97, the point raised was precisely identical with that determined in *Oswald v. Mayor of Berwick*.

(d) 8 Exch. 214; *Holland v. Lea*, 9 Ex. 430.

collection of the rates, etc., and duly execute all the duties of the office of permanent assistant overseer to the parish of W. F. Subsequently to the execution of the bond, the duties of the office filled by T. R. *became lessened* in consequence of the appointment of a relieving officer, and the vestry, with the consent of T. R., thereupon came to a resolution that T. R. should continue his office, at a reduced salary. It was held, that the surety was not discharged by this action on the part of the vestry, as it did not amount to a revocation of the office filled by T. R.

*Skillett v.
Fletcher.*

Another case of the same class is the recent one of *Skillett v. Fletcher* (a). There an action was brought on a bond, conditioned for the due performance by A. of his duties as collector of the poor rates and of the sewers rates for the parish of St. Anne; the bond to continue in force if A. held either office separately. The *breach* alleged was, that A. received money in both capacities and failed to pay it over. To this the defendant pleaded, that before breach an Act was passed increasing A.'s duties as collector of sewers rates, and under which he was also elected collector of main drainage rates, by the persons under whom he held his other appointments. This plea was held bad on demurrer, on the ground that the bond was divisible, and that the plea afforded no answer to the defendant's liability for A.'s breaches of duty as collector of poor rates. It was also held, that the appointment of A. to the new office of collector of main drainage rates did not avoid the bond, and also that the changes introduced by the Acts did not amount to an alteration of the office of collector of sewers rates to which A. was originally appointed, and, therefore, did not avoid the bond (b).

(a) L. R. 2 C. P. 469; S. C., 1 C. P. 217; followed in *Home Savings Bank v. Traube*, 42 Amer. R. 402 (U. S.).

(b) The judgments of LUSH, J., BLACKBURN, J., BRAMWELL, B., and MARTIN, B., in this case, are very instructive and will repay perusal. See also *Croydon Commercial Gas Co. v. Dickinson*, 2 C. P. D. 46.

If, indeed, the words of the condition of the surety-bond show that the surety intended that his liability should *not* continue after a change in the tenure, then his liability will be discharged if subsequently to the execution of the bond the office for the due fulfilment of which he is surety is converted from being an *annual* one into one *during pleasure*. This appears from the case of *The Mayor of Cambridge v. Dennis* (c). There the condition recited that S. had been appointed, under a certain statute, treasurer to a borough, and declared that it had been agreed that the obligor should join S. in the bond for the due performance of the office. The condition of the bond was declared to be that if S. should duly perform the office according to the provisions of the said statute, *and of such statutes as might be thereafter passed relating to the said office*, then the bond should be void, etc. At the time the bond was given, the office filled by S. was an *annual* office, but it was *subsequently* converted into an office "during pleasure." It was held, that the surety was discharged, and that the words in the condition, which provided that S. should duly perform the office according to the provisions of a certain statute, *and of such statutes as might be thereafter passed relating to the said office*, applied only to statutes that might be passed *during the year of office*. In this case, the decision in *Oswald v. Mayor of Berwick* (d) was approved of, but considered to be inapplicable, owing to the difference in the language of the bonds in the two cases.

Surety may stipulate that his liability shall not continue after any change made in tenure of third party's office.

The liability of the surety may also be destroyed by an alteration in the mode of payment, as well as by an alteration in the duties of the office. For where a bond given by a person as surety for the good behaviour of a third person in an office or employment *recites* that such third person is to be remunerated for his services

Surety may be discharged from liability by alteration in mode of paying the third party.

(c) Ell., Bl. & Ell. 660.

(d) *Ante*, p. 271.

in a particular way, the surety is discharged from all liability if, subsequently to the execution of the bond, any change be effected in the mode of remuneration.

*London & N.
Western Rail.
Co. v.
Whinray.*

This was decided in *The London and North Western Railway Co. v. Whinray* (a). These were the facts of the case: In January, 1851, the defendant, as surety, executed a bond to a railway company, which, after reciting that the company had agreed to appoint L. as their clerk or agent for the purpose of selling coal, *at a yearly salary of 100l.*, was conditioned for the due accounting by L. of all moneys received by him for the use of the company. L. performed the duties of such clerk or agent at the above salary until May, 1851, when it was agreed between L. and the company to substitute for such salary a commission of sixpence per ton on all coal for which he should obtain orders. From that time L. was paid for his services by such commission, which amounted to a larger sum than the fixed salary. In 1852, L. was indebted to the company for sums which he did not pay over, and the company having sued the defendant on his bond, it was held (among other things), that the condition of the bond was restrained by the recital, so that the defendant, as surety, only undertook to be responsible for the faithful conduct of L. whilst he continued clerk at such fixed salary, and consequently that the defendant was not liable after the change in the mode of remuneration.

Liability
of a surety
for fraud.

(IV.) Having considered from what time a guarantee operates, to what things it extends, and how long it continues, we may now conveniently notice the rule, that beyond the mere letter of the guarantee contained within in its four corners, a surety may be liable for *fraud*. Thus, a surety who gives a guarantee which he knows to be worthless, and thereby induces a person to supply goods to a third person, is liable as for a

fraud. This is shown by the case of *Barwick v. The English Joint Stock Bank* (b). In that case the plaintiff was induced to continue to supply oats to a government contractor, who was a customer of the defendant's bank, on a guarantee from the bank manager to the effect that the customer's cheque in the plaintiff's favour, in payment for the oats supplied, should be paid on receipt of the government money, in priority to any other payment, "except to this bank." The manager fraudulently concealed from the plaintiff that the customer was then indebted to the bank in 12,000*l.*; the result was that the plaintiff was induced to advance money to the customer on a guarantee which turned out to be worthless, and which the manager must have known to be worthless when he gave it. The declaration contained, among other counts, one for deceit, in which the fraud of the manager was laid as the fraud of the bank. Held, that it was properly so laid, and that the defendants would be liable for the fraud of their agent.

In this connection it may be mentioned that the referee of an intending lessee of premises who, when applied to by the owner thereof as to the means and position of lessee, wilfully and knowingly asserts that the latter is a man of substance and respectability, being well aware that the reverse is the case, is liable to damages for such misrepresentation (c).

The question of whether a voluntary settlement made by a surety of the whole of his property can be supported by showing that when he made it the principal debtor had assets enough to pay the amount guaranteed, was considered in the case of *In re Ridler, Ridler v. Ridler* (d). The court there held, that where a surety, whose guarantee is one which he must know will

Liability of the referee of intending lessee for fraud.

Voluntary settlement made by surety whether fraudulent and void against creditors within 13 Eliz. c. 5.

(b) L. R. 2 Exch. 259; 36 L. J. Exch. 147; 16 L. T. 461; 15 W. R. 877. See also *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swire v. Francis*, 3 App. Cas. 106.

(c) *Leddell v. M'Dougall*, 29 W. R. 403.

(d) 22 Ch. D. 74.

probably be enforced, makes a voluntary settlement, without leaving enough property to pay his creditors, he must be considered to do it with an intent to defeat or delay them, so as to make the settlement a fraudulent one within 13 Eliz. c. 5. In his judgment in this case, Lord Chancellor *Selborne* thus expresses himself:—"I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into. I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that it need not be regarded; but if he conveys away all his property by a voluntary settlement, I think it doubtful whether the settlement could in any case be supported in the event of his being ultimately called on under his guarantee."

Effect on
surety's
liability of a
change in
constitution
of persons to
or for whom
the guarantee
is given.

(V.) In the cases which we have hitherto been considering, it will be observed that the liability of the surety depends upon the circumstances as they exist or were contemplated at the time the guarantee was given. But, in some cases, the surety's liability may be considerably affected by events, not at all contemplated by the parties, occurring subsequently to the execution of the guarantee, and altering the position of the parties. The most common cases in which this happens are, where a change takes place in the constitution of a partnership firm to whom or for whom the guarantee is given, or where a bankruptcy takes place. We will commence by noticing those cases where, subsequently to the execution of the surety-bond, the obligees of the bond have ceased to occupy the positions filled by them at the time of the execution of such bond.

*Leadley v.
Evans.*

In *Leadley v. Evans* (a), a bond, after reciting the appointment of J. B. by churchwardens and overseers as a collector of church and poor rates, was conditioned for the duly accounting to the obligees and their

(a) 2 Bing. 32. See also *Metcalfe v. Bruin*, 12 East, 400.

successors for money received pursuant to, and in execution of, the office of collector. It was held, that the obligors were not responsible for receipts on account of any year subsequent to that during which the obligees were in office. It is to be observed that in this case the offices of churchwarden and overseer were shown to be *annual* offices. Indeed, the court took *judicial notice* of the fact. Now J. B., as collector, was nothing more than *deputy* to the overseer, and it was therefore held by *Best*, C.J., that as the office of overseer was annual, so must be that of deputy. In *M'Gahey v. M'Gahey v. Alston* (b), however, which was much the same sort of case as *Leadley v. Evans*, it appeared that the office, for good behaviour in which security was given by bond, was not, according to the construction of an Act of Parliament, merely co-existent with that of the obligees of the bond. It was, therefore, held, that the bond continued in force after the obligees, to whom it was given, had gone out of office.

When guarantees are given *to* partners, or as security for the debt, default or miscarriage *of* partners, it frequently becomes a very nice question for decision, whether the surety continues liable *after* a change has taken place in the firm *to* or *for* whom he had consented to become answerable.

Effect on liability of surety of change in the firm *to* or *for* whom guarantee given.

The 18th section of the Partnership Act, 1890, 53 & 54 Vict. c. 39, s. 18. provides as follows:—"A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given."

This enactment

This section replaces s. 4 of the Mercantile Law

declaratory of the common law. Amendment Act, 1856 (19 & 20 Vict. c. 97), which is repealed, and, like it, merely affirms the common law (a). For, though the wording of s. 18 differs considerably from that of the previous Acts, so far at least as relates to England, it does not appear to have introduced any alteration in the law (b).

Consequently those cases which were decided *before* the passing of this enactment, upon the subject which we are now considering, are still binding, as the doctrines thereby established have now been expressly sanctioned by the Legislature (c). We propose, therefore, to examine them, and in doing so we shall not confine ourselves exclusively to cases where guarantees were given to or for *partners*, but we will also examine those strictly analogous cases where guarantees were given to or for *individuals* who have subsequently altered their condition.

In the following examples it will be observed that the judges were very careful not to bind the surety *beyond the scope of his engagement*; and that, in the absence of express stipulation or necessary implication to the contrary, they have always held his liability to determine on any change taking place in the persons *to or for* whom the guarantee was given (d).

I. Where, after guarantee given, change has taken place in persons to whom guarantee is given.

We will *first* examine those cases where, after the execution of the guarantee, a change took place in the persons *to whom* such guarantee was given.

- (1.) *Where the change consisted of an increase in the number of persons to whom the guarantee was given.*

Whether an increase in the number of partners to whom a guarantee was given discharged the surety

(a) See *Backhouse v. Hall*, 6 B. & S. 507; 34 L. J. Q. B. 141. Addison on Contracts, 9th ed., p. 1001, 1002.

(b) *Lindley's Partnership Act*, 1890, p. 47; *Lindley on Partnership*, 6th ed., p. 127.

(c) *Lindley on Partnership*, 6th ed., p. 127.

(d) Many of these cases are collected and commented upon in note (d), at p. 326 of 3 Douglas' Reports.

seems to have been somewhat unsettled before Parliament interfered on the subject (e).

In *Wright v. Russell* (f), a bond, conditioned for the honesty of one *Baird*, a clerk, was given by the defendant to one *Wright*, the employer of the clerk. *Wright*, subsequently to the giving of the bond, entered into partnership with one J. D. It was held, that the defendant was no longer liable on the bond. It was said, in the judgment in this case: "It is truly said that the defendant (the surety) ought not to be bound beyond the scope of his engagement, which was to be answerable for the fidelity of *Baird* to *Wright* only, not to *Wright* and any other person or persons. . . . The defendant *Russell* engaged for *Baird's* faithful service to *Wright*. When *Wright* took in a partner there was an end of the obligation; the condition was confined to *Wright* only, and the breach assigned is for non-payment of the money to *Wright* and *Delafield*, or either of them, which is not within the condition. The defendant *Russell* and the other surety might have confidence in *Wright*, that he would be careful with respect to the conduct of *Baird* in his office of broad clerk, which they might not have in any partner with *Wright*, and, for anything that appears to the court, the defendant *Russell* had no conception of being engaged for *Baird's* fidelity to any other person besides *Wright*."

It appears that in the case just cited the breach assigned was for embezzling the partnership money, not the money of Mr. *Wright* only. This circumstance is commented on by *Buller, J.*, in *Barclay v. Lucas* (g).

(e) As stated *supra*, the 4th section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) is now repealed by the Partnership Act, 1890 (53 & 54 Vict. c. 39), which contains, however, a similar provision in s. 18.

(f) 3 Wils. 530; 2 Bl. Rep. 934.

(g) Cited in a note to *Barker v. Parker*, 1 T. R. at p. 291. But see 1 N. R. 42; 4 Taunt. 681, from which it appears that the decision in *Barclay v. Lucas* has been doubted.

persons to whom the guarantee is given.
Wright v. Russell.

Barclay v. Lucas.

There the bond sued upon, after reciting that the plaintiffs, at the recommendation of the defendant and another, had agreed to take one P. J. into their service and employ as a clerk in their shop and counting-house, was conditioned for his *fidelity* in such service. While P. J. continued in the service a new partner was admitted, after which P. J. embezzled a sum of money, the property of all the then partners. A verdict was given for the plaintiffs, subject to the opinion of the court by whom judgment was given for the plaintiffs. Lord Mansfield, C.J., said: "The question in this case turns upon the intention of the parties at the time of entering into the contract. In questions upon intention we must look to the subject-matter of the contract. It is notorious that there are many banking houses in the city which continue for generations. This can only be done by a constant succession of partners, and even if they should not bear the same name with the first proprietors, yet still the *house* frequently continues under the original firm. To carry on this business it is necessary to have a great number of clerks, whose office is extremely beneficial; for besides the present fees and emoluments, they are frequently taken into partnership in process of time. But it is of the utmost consequence to these houses that the clerks should behave honestly; and, therefore, a security is taken for their fidelity. The circumstance of taking in a new partner makes no difference either as to the quantity of the business, or the extent of the engagement. He continues to carry on the business of the plaintiffs; and this contract is co-extensive with his continuance in the house. This is a security to the *house* of the plaintiffs, and no change of partners will discharge the obligor."

*Spiers v.
Houston.*

In *Spiers v. Houston* (a) it was held that a guarantee of moneys advanced by a firm will not extend to it after

(a) 4 Bligh (N.S.) 515.

a new partner has been introduced therein. And payments made by the principal, after such alteration of the firm, and in transactions with him, are applicable to the extinction of the balance due to the old firm at the date of the alteration (*b*).

(2.) *Where the change consisted of a diminution in the number of the persons to whom the guarantee was given.*

Where
number of
persons to
whom
guarantee
given is
diminished—
By death.

(a) *By Death.*

The effect of a change by death in the firm to whom the guarantee is given, generally speaking, was to discharge the surety. Thus, in *Strange v. Lee* (*c*), the defendant's bond recited that A. intended forthwith to open an account with C., D. & E. as his bankers, and was conditioned for the payment to C., D. & E. of all sums from time to time advanced to A. at the banking house of C., D. & E. It was held, that on C.'s death the obligation ceased, and did not cover future advances made after another partner was taken in, and that A., who was indebted to the house at C.'s death, having afterwards paid off the balance, which was applied at the time to the old debt incurred in C.'s lifetime, A. was wholly discharged from his obligation. Lord *Ellenborough* distinguished this case from *Barclay v. Lucas* (*d*), on the ground that the words of the bond in the latter case were different, for in that case the bond provided that the clerk was to be taken into the service of the obligees, as a clerk in their shop and counting-house, which might be supposed to mean the same house, however the individual partners might change.

So, again, in *Barker v. Parker* (*e*), it was held, that a bond with a condition that a clerk should faithfully

Strange v. Lee.
Barker v. Parker.

(b) *Ib.*

(d) *Ante*, p. 279, 280.

(c) 3 East, 484.

(e) 1 T. R. 287.

serve and account for money to the obligee *and his executors*, did not make the obligor liable for money received by the clerk in the service of the obligee's executor. Lord *Mansfield*, C.J., said: "The bond in question is relative to the service with *Pyott*, the testator. It was given as an indemnity that the clerk should be *faithful to him*, and should pay all the money received on *his* account to him, or to his executors; because money might be in his hands at the time of the testator's death, for which he could only account to the executors. So that it was the intention of the parties that the bond should not be extended beyond the life of the testator."

Weston v.
Barton.

To the same effect, also, is the case of *Weston v. Barton (a)*. There the condition of the bond was for the repayment to five persons of all sums advanced by them, or any of them, to *Catterall & Watson*, in their capacity of bankers. It was held, that the bond did not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers (*b*).

Pemberton v.
Oakes.
Chapman v.
Beckington.

Similar decisions were also come to in the cases of *Pemberton v. Oakes (c)*, and *Chapman v. Beckington (d)*. In the latter case, Lord *Denman*, C.J., said: "Many cases were cited to show that, where the surety had covenanted with the house, and not the members of the firm, or had stipulated that his liability should not be affected by a change of the members, he would remain liable to the new firm. These cases we do not in the least question, our judgment proceeding on the language of this condition, making all due allowance for the effect which the language of the deed ought to have on its construction."

(a) 4 Taunt. 673.

(b) The judgment of *MANSFIELD*, C.J., in this case is very instructive.

(c) 4 Russ. 154; and see *Bank of Scotland v. Christie*, 8 Cl. & F. 214.

(d) 3 Q. B. 703.

Even the circumstance that the guarantee was to be for a fixed time, which had not expired when the change in the firm happened, made no difference as to the application of the rule. Thus, in *Holland v. Teed* (e), under a guarantee given to a banking house consisting of several partners, for the repayment of such bills drawn upon them by one of their customers as the bank might honour, and any advances they might make to the same customer, it was *held* that the guarantee *ceased* upon the death of one of the partners in the bank, before the expiration of the time to which the guarantee was expressed to extend. It was also *held*, that bills accepted before the death of the partner, and payable afterwards, were within the guarantee; that the amount guaranteed could not be increased by any act of the continuing firm and the customer after the death of the partner, although such amount might be diminished by such act.

Even before the enactments already mentioned (f), however, the liability of the surety continued, if it appeared that the parties intended it should do so, notwithstanding a change in the firm. Thus, in *Metcalf v. Bruin* (g), the bond was given to "seven of the trustees of the Globe Insurance Company," or to their certain attorneys, executors, administrators or assigns, to secure the faithful services of a clerk to the Globe Insurance Company. The condition of the obligation was, that if the clerk should, from time to time, and at all times thereafter, *during his continuance in the service of the said company*, faithfully serve the said company, and should, when required, deliver in writing a true account of all moneys, etc., which in the said

Holland v. Teed.

By agreement surety may continue liable after change in firm to whom guarantee given.
Metcalf v. Bruin.

(e) 7 Hare, 50. See also *Pemberton v. Oakes*, 4 Russ. 154.

(f) *I.e.* 19 & 20 Vict. c. 97, s. 4 (repealed), and 53 & 54 Vict. c. 39, s. 18, *ante*, pp. 277, 278.

(g) 12 East, 400. See also *Leadley v. Evans*, 2 Bing. 32, and *Barclay v. Lucas*, 1 T. R. at p. 291.

service should come to his hands on account of the said company, or to such person *as the said company* or the court of directors thereof, *for the time being*, should appoint; and should indemnify the said company and the directors and *all other members thereof* for all losses, etc., etc., which the company or any of its members might sustain, by anything done or neglected by the said clerk during his said service, then the obligation to be void. The Globe Insurance Company was not a corporation. It was held, that the said bond might be put in suit by the trustees, for a breach of faithful service by the clerk, committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent, to contract for such service to be performed to the company as a fluctuating body, and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body (a).

*Kipling v.
Turner.*

The case of *Kipling v. Turner* (b) proceeds much on the same principle as *Metcalfe v. Bruin* (c). In *Kipling v. Turner*, the condition of a bond, after reciting that A., B. and C. had filed a bill in equity against R. M. and J. S., was that the obligor would pay all such costs as the Court of Chancery should award *to the defendants* on the hearing of the cause. It was held by *Bayley, J., Holroyd, J., and Best, J. (Abbott, C.J., dubitante)*, that the death of one of the defendants, before any costs awarded, could not be pleaded in discharge of the bond. *Bayley, J.*, said, "This bond is not conditioned

(a) The able judgment of Lord ELLENBOROUGH, C.J., in this case merits perusal.

(b) 5 B. & Ald. 261.

(c) *Supra*.

to pay such costs as the court of equity shall award to R. M. and J. S. by name, but to pay such costs as shall be awarded by the court *to those who, at that time, fill the character of defendants in equity*. The case is very different where persons are described *by character* and where they are described *by name*. If, for instance, a man makes A., B. and C. his executors, and directs that A., B. and C. shall sell his property, then if A. dies, B. and C. cannot sell it; but if he directs *his executors* to sell it, B. and C. may do so. In this case, therefore, I think that if any costs were awarded to persons filling the character of defendants in equity, they would be within the bond, and here it appears by the replication that there were costs so awarded. I am, therefore, of opinion that there should be judgment for the plaintiff."

(b) *By one partner retiring from the firm.*

The voluntary retirement by a partner from the firm had, even before the passing of the enactments on the subject (d), the same effect as his death—it put an end to the surety's liability. Thus, in *Myers v. Edge* (e), it was held that a promise in writing directed to A. B., etc. (a house in trade), to pay for goods to be furnished to another, cannot be enforced in an action by B. and C. to recover the value of goods furnished after A. had *withdrawn* from the partnership. In *Pease v. Hirst* (f), however, it was held, that as the instrument (a promissory note payable to the five members of a banking house *or order*) was framed so as to comprehend future as well as present partners, the maker of the note was liable notwithstanding a change in the firm by the retirement of a partner from the firm.

Diminution by retirement of persons from firm to whom guarantee given.
Myers v. Edge.

Pease v. Hirst.

(d) *Ante*, pp. 277, 278.

(e) 7 T. R. 254. See also *Dry v. Davy*, 10 A. & E. 30; *Solvency Mutual Guarantee Society v. Freeman*, 7 H. & N. 17; 31 L. J. Ex. 197.
(f) 10 B. & C. 122.

Effect on
surety's
liability of
incorporation
or con-
solidation of
the persons to
whom the
guarantee
was given.
Dance v.
Girdler.

(3.) *Where the change consisted of the incorporation or consolidation of the persons to whom the guarantee was given.*

Where the effect of the consolidation was entirely to change the nature and circumstances of the creditors the surety was discharged, even before the passing of enactments already referred to (a). Thus, in *Dance v. Girdler* (b), a bond was given to A., B., C., etc., payable to them and their successors as the governors of the Society of Musicians, conditioned to secure J. H.'s faithfully accounting with them and their successors, governors, etc., as their collector; *afterwards*, the society was incorporated by letters patent, at which time J. H. had duly accounted for all moneys collected by him, but after the incorporation he received moneys for which he did not account. It was *held*, that the obligor was not liable for such default of J. H. in an action on the bond. Lord *Mansfield*, C.J., in his judgment, while pointing out that it would be unreasonable, under the circumstances, to hold the surety liable, inasmuch as a voluntary society, to which the bond was given, is very different in character from the corporation which had been substituted for such voluntary society, expressly bases his decision on the ground, that according to all the cases which had been cited, as well as others which might be found, the surety was not bound to answer for sums received after the charter of incorporation, which constituted a perfectly new body of persons in point of law. But, where the consolidation makes no substantial difference in the situation of the

(a) 19 & 29 Vict. c. 97, s. 4, repealed by the Partnership Act, 1890 (53 & 54 Vict. c. 39), which, however, contains a somewhat similar section (s. 18, set out *ante*, p. 277).

(b) 1 N. R. 34; and see the following *American* cases:—*Exeter Bank v. Rogers*, 7 New Hamp. 21; *Bank of Washington v. Barrington*, 2 Pin. & Watts (Pa.) 27; *McGill v. Bank of United States*, 12 Wheaton 511; *Bank of United States v. Magill*, 1 Paine 661; *Amicable Mutual Life Insurance Co. v. Sedgwick*, 110 Mass. 163.

creditor and the surety, the latter is not discharged. Thus, where a surety became bound by bond for the good behaviour of a clerk to two railway companies, and, subsequently to the execution of such bond, these two companies were consolidated by Act of Parliament, it was held, that the surety was not discharged, as the consolidation of the two companies did not affect the duties or responsibility of the principal or surety, notwithstanding the new company possessed additional lines (c).

In this connection it may be useful to state that, where a guarantee is given to a private or joint stock bank, in respect of advances to be made or credit given to a customer, and afterwards such bank loses its identity by being consolidated with another bank or banking company, the liability of the surety for *subsequent* advances made, or credit given, will most probably be determined thereby (d). Section 18 of the Partnership Act, 1890, certainly favours this view. Moreover, though this section only concerns expressly continuing guarantees, the principle contained in it equally applies to the somewhat analogous case where securities have been deposited with bankers to secure further advances (e). *Primâ facie*, the securities extend only to advances which are made by the firm, whilst its members continue the same as when the

Effect of bank amalgamation on surety's subsequent liability.

Principle of s. 18 of Partnership Act, 1890, applicable to deposits with bankers to secure further advances.

(c) *London, Brighton and South Coast Railway Co. v. Goodwin*, 3 Exch. 320. See also *Eastern Counties Union Railway Co. v. Cochrane*, 9 Exch. 197, where the consolidating statute expressly provided that all bonds, etc., made or entered into, with, in favour of, or by the dissolved companies, should "be and remain as good, valid, and effectual in favour of and against and with reference to the new company, and might be proceeded on and enforced in the same manner to all intents and purposes as if the new company had been a party to and executed the same, or had been named and referred to therein instead of the persons, company or party, actually named therein respectively."

(d) See Lindley on Partnership, 6th ed., p. 127.

(e) Lindley's Partnership Act, 1890, p. 47; Lindley on Partnership, 6th ed., pp. 127, 128.

securities were deposited (a). But a security given to a firm for advances to be made by it, is, upon a change in the firm, readily made a continuing security; and a slight manifestation on the part of the borrower that it should so continue, will enable the new firm to hold the securities until the advances made by itself, as well as those made by the old firm, have been repaid (b).

II. Where, after guarantee given, change has taken place in persons for whom it was given.

We will *next* examine those cases where, after the execution of the guarantee, a change has occurred in the persons *for* who such guarantee was given.

(1.) *Where the change consisted of an increase in the number of persons for whom the guarantee was given.*

By increase in the number of persons for whom the guarantee was given.

The general effect of an increase in the number of persons for whom a guarantee is given — as, for instance, an increase by the principal's entering into partnership with others—would seem always to have been, as it still is (c), to discharge the surety from liability for acts done by his principal jointly with such others. Thus, in the case of *Bellairs v. Ebsworth* (d), it was decided that if A. become bound to B. under condition that C. shall truly account to B. for all sums of money received by C. for B.'s use, and C. subsequently to the giving of such bond, with B.'s knowledge, takes D. as his partner, the guarantee does not extend to sums of money received by C. for B.'s use, after the formation of the partnership. Lord *Ellenborough*, in his judgment, says: "The defendant was surety for *Philip Nott*, and not for *Mingay, Nott & Co.* When the plaintiffs intrusted their agency to the new firm, the defendant's responsibility was at an end. He by no means undertook for the good conduct of any future partner with whom *P. Nott* might

Bellairs v. Ebsworth.

(a) *Ib.*; Per Lord ELDON in *Ex parte Kensington*, 2 V. & B. 83.

(b) Lindley's Partnership Act, 1890, p. 47.

(c) See the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18, *ante*, p. 277.

(d) 3 Camp. 52.

associate. The recital and the whole scope of the condition show that the suretyship was confined to *P. Nott* individually."

In *Montefiore v. Lloyd* (e), the facts were as follows : *Montefiore v. Lloyd*.
The defendant, as surety, executed a bond, the condition of which was declared to be, that L. should pay to the plaintiffs, an insurance company, all moneys received by him for assurances effected with the said company, and should duly account for all moneys received by him for the said company. The defendant, before signing the bond, received a letter stating that L. was about to enter into partnership with F. as agents of the said company. Four months afterwards L. duly entered into partnership with F. The firm of F. & Co. having become indebted to the company as such agents in a considerable sum, it was held that this was a default for which the defendant was not liable.

Although, however, the general rule is as before stated, yet the circumstances may be such—or the transaction may be of so peculiar a nature—that the surety's liability is not affected by an increase in the number of persons acting in the matter guaranteed. This happened in the case of *Leathley v. Spyer* (f). *Surety not always discharged by increase in number of persons for whom a guarantee is given.*
The facts there were as follows : J. S. wished to carry on business as an insurance broker at *Lloyd's*. By the rules of *Lloyd's* he could only do this on being admitted a subscriber and giving security to the committee. Thereupon, in March, 1858, the defendant and another person addressed the following letter to the committee : "We each of us hereby hold ourselves responsible to the extent of 750*l.* for any debts that J. S. (who has applied to your committee to be admitted a subscriber to your institution, to enable him to act as an insurance broker) may contract in his capacity of such broker, for two years from this date,

(e) 12 W. R. 83.

(f) L. R. 5 C. P. 595; and see *Bank of British North America v. Cuwillier*, 4 L. T. 159.

and till notice." J. S. was therefore admitted, and acted as a broker on his *sole account* until January, 1860, when he took H. into partnership, with the knowledge of his sureties. In April, 1860, the defendant and his co-surety gave notice to the committee for the discontinuance of the guarantee; but, upon being informed that J. S. could not be allowed to remain a member of *Lloyd's* without security, they, on the 17th of that month, addressed the committee as follows: "The letter we addressed to you under date of the 11th instant, notifying the putting an end to our guarantee dated 24th March, 1858, on behalf of J. S., we now hereby withdraw, and declare that such guarantee shall continue in force upon the same terms and conditions as are mentioned in such guarantee." By the rules of *Lloyd's*, one member only of a firm is allowed to act as a broker; but he may obtain a "substitute's ticket," which enables his substitute to contract for him in the house. In January, 1862, J. S. appointed H. his substitute, and H., as his substitute, entered into contracts with underwriting members of *Lloyd's*. All the contracts made after April, 1860, whether by J. S. or his substitute, were made in the name and on account of the partnership. Many of these contracts resulted in debts due to members of *Lloyd's* from the partnership. It was held that the guarantee was to be construed with reference to the circumstances existing in April, 1860; that it included, therefore, all transactions by J. S. in his capacity of broker after April, 1860, whether by himself, personally, or by H. as his substitute, and whether for his own sole benefit or for the benefit of the firm; and, consequently, that the defendant was liable under the guarantee for these partnership debts. "I am of opinion," says *Willes, J.*, in this case, "that the plaintiffs are entitled to judgment. Looking at the guarantee, without the light of the surrounding circumstances, it would appear to be a

guarantee for the acts of J. S. only, and for debts incurred for himself alone; and *Bellairs v. Ebsworth* (a) and *Montefiore v. Lloyd* (b) would have been applicable. It would have been as if a simple guarantee of debts due from A. had been sought to be extended and applied to debts incurred by A. jointly with B., whom he had afterwards taken into partnership. The short answer would have been, that the defendant agreed to become surety for A., but not for B. The character of the transaction would have been altogether different from that for which the defendant undertook to be liable. But, when the surrounding circumstances are looked at, it would appear that, though the persons liable for the transactions at *Lloyd's* were a firm, whereas the person originally contemplated by the guarantee was only an individual, yet that the guarantee was given, not with reference to the single individual being the person ultimately liable, but with reference to a course of business in a particular house, viz., *Lloyd's*, such business being carried on with the individual named; and so the transactions in respect of which the defendant is sought to be made liable are not different in character from those to which the guarantee referred."

- (2.) *Where the change consisted in a diminution in the number of the persons for whom the guarantee is given.*

Diminution in number of persons for whom guarantee given.

(a) *By death.*

The effect of the death of one of the principal debtors was, before the enactments already mentioned (c), and still is (c), to determine the surety's future liability. Thus, in *Simson v. Cooke* (d), a bond by which, after reciting the partnership of J. C. and T. C., one W. P. became surety for such sums as should be advanced to

By death.

Simson v. Cooke.

(a) 3 Camp. 53, and see *ante*, p. 288.

(b) 15 C. B. (N.S.) 203; 33 L. J. C. P. 49, and see *ante*, p. 289.

(c) *Ante*, pp. 277, 278, i.e., 19 & 20 Vict. c. 97, s. 4 (repealed), and 53 & 54 Vict. c. 39, s. 18.

(d) 1 Bing. 452.

meet bills drawn by J. C. and T. C., or either of them, was held not to extend to bills drawn by J. C. *after the death* of T. C.

By one
partner
retiring from
the firm.

(b) *By one partner retiring from the firm.*

*University of
Cambridge v.
Baldwin.*

The voluntary retirement of one of the principal debtors likewise had, and still has (a), the effect of putting an end to the surety's liability. In the case of *The University of Cambridge v. Baldwin* (b), the condition of a bond recited that the chancellor, masters and scholars of the University of Cambridge had appointed B., C. and J. *their agents* for the sale of books printed at their press in the university, and that the defendant had offered to enter into a bond with them as a surety; and it was conditioned that if the said B., C. and J., *and the survivors and survivor of them*, and such other persons as should or might at any time or times thereafter, in partnership with *them or any or either* of them, *act as agent or agents* of the said chancellor, etc., and their successors, for all books delivered or sent to *them or any or either of them* for sale as aforesaid, and should pay all moneys which should become payable to the said chancellor, etc., in respect of such sale, then the obligation to be void, etc. An action having been brought on this bond against the surety, it was *held* that, by the *retirement* of J. from the partnership of B., C. and J., the defendant, as their surety, was discharged from all further liability on this bond.

The extent of the surety's liability has now been dealt with so far as regards the time from which a guarantee operates, the things to which it extends, the period during which its operation continues, and the persons in whose favour and on whose account its operation will take effect.

(a) *Ante*, pp. 277, 278, *i.e.*, 19 & 20 Vict. c. 97, s. 4 (repealed), and 53 & 54 Vict. 37, s. 18. (b) 5 M. & W. 580.

VI. Let us now consider the only remaining question which can affect the extent of the liability of the surety; namely, the liability of a *bankrupt* surety.

Before default on the part of the principal debtor, the creditor could not, formerly, prove against the estate of a bankrupt surety (c). So no proof was allowed in bankruptcy, upon an undertaking to pay, on one month's notice, the debt of another, where such notice was not given before the bankruptcy, for otherwise it was not a debt at the time of the bankruptcy (d).

The 56th section of 6 Geo. 4, c. 16, appears, however, to have given the creditor an enlarged right of proof against the bankrupt surety (e). Under this enactment, it was decided that where a bond was given by a person as surety for the payment of money by another on a day named, and before such day the surety became bankrupt, and afterwards the principal debtor made default, the creditor could prove for what was due from the principal debtor under the commission against the surety (f). So, where a bond of indemnity was executed by a person, and before the amount of damage was ascertained the obligor became bankrupt, the court directed a claim to be entered, on the ground that a contingent debt was provable under s. 56 of 6 Geo. 4, c. 16 (g).

In the case of *Re Willis* (h), it was decided that a claim, under a guarantee, for a sum certain, *when* due, was provable as a debt, and, *before* it was due,

(c) *Ex parte M'Millan*, Buck, 287; *Ex parte Gardom*, 15 Ves. 286; *Ex parte Adney*, Cowp. 460; *Alsop v. Price*, Dougl. 160; *Overseers of St. Martin v. Warren*, 1 Barn. & Ald. 491; *Hoffam v. Foudrinier*, 5 M. & S. 21.

(d) *Ex parte Minet*, 14 Ves. 189; *Ex parte Gardom*, *supra*.

(e) Robson's Law of Bankruptcy, 7th ed., p. 300.

(f) *Ex parte Lewis*, M. & M. 426. See further, *Ex parte Myers*, Mont. & Bli. 229; *Ex parte Simpson*, 1 M. & Ayr. 451.

(g) *Ex parte Marshall*, Mont. & Bli. 242.

(h) 19 L. J. (N.S.) Exch. 30.

The effect upon the surety's liability of his own bankruptcy.

Formerly no proof allowed against surety's estate before principal's default.

Enlarged right of proof conceded by 6 Geo. 4, c. 16.

was provable as a debt due on a contingency under 6 Geo. 4, c. 16, s. 56.

Where a person guaranteed to a banking company "all current obligations in their hands to which B. may be a party, and also all his future obligations and engagements that may come into their hands," it was held that the banking company might, on the bankruptcy of the surety, prove for the amount of their advances to B. *subsequent* to the date of the guarantee (a).

The contingent debt clauses of the old Bankruptcy Acts did not, however, it seems, apply to cases where, from the nature of the case, there might never be a debt due from the principal debtor for whom the bankrupt was surety (b). To constitute a debt payable on a contingency within the 56th section of 6 Geo. 4, c. 16, it must have been a debt capable, *à priori*, of valuation (c). Where the defendant gave the plaintiff a guarantee to the extent of 200*l.*, but revocable at his option, on giving him notice in writing, and afterwards became bankrupt and obtained his certificate of conformity under 12 & 13 Vict. c. 106, but did not give notice to determine the guarantee, it was held that his liability was a contingent liability within s. 178 of that statute, and that the certificate was a bar to all claims under the guarantee (d). However, the right of proof against a surety is now regulated by the 37th section of the Bankruptcy Act, 1883 (e), which

Right of
proof under
Bankruptcy
Act, 1883.

(a) *Ex parte Littlejohn*, 3 M. D. & D. 182. See also *Ex parte Hope* 3 M. D. & D. 720.

(b) *Ex parte Thompson*, Mont. & Bli. 219, 229.

(c) *Per* ERSKINE, J., in *Ex parte Thompson*; and see *Amott v. Holden*, 18 Q. B. 593; 17 Jur. 318; *White v. Corbet*, 1 El. & El. 692.

(d) *Boyd v. Robins*, 4 C. B. (N.S.) 749; 27 L. J. C. P. 299.

(e) For recent cases under this section see *Barnett v. King*, (1891) 1 Ch. 4; *Wolmershausen v. Gullick*, (1893) 2 Ch. 514; *In re Browne & Wingrove*, *Ex parte Ador*, (1891) 2 Q. B. 574, where the history of the law as to proof for interest in bankruptcy is considered.

is quite as comprehensive in its terms as s. 31 of the Bankruptcy Act, 1869, of which latter enactment it has been remarked that its words "are so general and so comprehensive as to include almost every transaction in which men can engage, from express contract to 'remote possibility'" (*f*).

It is hardly necessary to state that the creditor's proof against the surety's estate will be rejected in cases where the surety has been discharged from liability by the conduct of the creditor (*g*).

It is important to bear in mind that no admission or acknowledgment by the debtor, or judgment obtained against him, can fix the surety with liability for an amount other than that which was really due, and which alone the surety has contracted to pay, should default be made by the debtor. Therefore, where a surety engaged to be answerable for any debt another person might owe for wines, and for any damages which might be sustained by breach of any other provisions of the agreement, it was held that the creditors were not entitled to prove against the surety for the amount found due by an award made in an arbitration between the creditors and the principal debtor (*h*).

A word or two must now be said with regard to the measure of proof on a guarantee. Where proof is made against the estate of the bankrupt surety, if, at the time of proving, the creditor has received part of the debt, either by payment or as a dividend from the

(*f*) See Robson's Law of Bankruptcy, 2nd ed., p. 242; and see *Ibid*, 7th ed., p. 239. An assignee's future and contingent liability on his covenant to indemnify the lessee is a provable debt unless an order of the court declares it to be a liability incapable of being fairly estimated. *Morgan v. Hardy*, 18 Q. B. D. 646, C. A.; 13 App. Cas. 351.

(*g*) The discharge of the surety is dealt with on a subsequent page, *post*, Cap. VI. pp. 363 *et seq.*

(*h*) *Ex parte Young, In re Kitchen*, 17 Ch. D. 668; 50 L. J. Ch. 824.

Proof against estate of surety, who has been discharged by conduct of creditor, will be rejected.

Award against principal debtor does not dispense with necessity for strict proof of surety's liability by creditors against his estate.

Measure of proof on guarantee.

estate of the principal debtor, or even if such dividend has been declared, although not actually paid, such creditor will be allowed to prove for the residue only after deducting the amount so paid or declared (a). But if, after proof is made, the creditor receives a dividend from the estate of the principal debtor, that will not be deducted from the amount of his proof (a).

The amount for which the proof may be made by the creditor against the bankrupt surety's estate is sometimes a matter of difficulty to determine. This was the case in *Commercial Bank of Australia v. Official Assignee of the Estate of Wilson & Co.* (b), in which the facts were as follows:—A bankrupt and others had become guarantors to the appellants of a principal debtor's liability for the sum of 6,250*l.*, and three of the guarantors thereafter entered into agreement with the appellants that their liability should be limited in this way: that there should be substituted for it a deposit of 3,000*l.* in the bank, to be carried to a suspense account, with power to the appellants to appropriate that sum whenever they thought fit in discharge *pro tanto* of the principal debt. It was held that such deposit did not until appropriation operate as payment, and that the appellants were entitled to prove for the full amount of their debt against the estate of a bankrupt co-surety, who was not a party to the above agreement.

Creditor seeking to prove in respect of a guarantee must have sufficient interest therein to entitle him to do so.

The question sometimes arises whether the person seeking to prove in respect of a guarantee has really a sufficient interest in the guarantee to entitle him to do so. This point recently arose, under the following circumstances:—M. drew bills upon the B. and A. Co.; and a banking company, under an agreement with M., guaranteed the acceptors (also a company) that they

(a) *In re Blakeley, Ex parte Aachener Disconto Gesellschaft*, 9 Morrell 173. See also *Ex parte Reeder*, Buck, 381.

(b) (1893) A. C. 181.

would supply them with goods to meet the bills. S. discounted the bills, being informed by M. of the guarantee of the banking company, but he gave no notice to the banking company or to the acceptors. Afterwards the banking company and the acceptors suspended payment and were wound up. M. also executed a deed of composition with his creditors. It was held that S. had no equity to rank as a creditor of the banking company in respect of the guarantee (c). *Wood, L.J.*, in his judgment in this case, pointed out that the person who induced S. to discount the bills in question was the *drawer* of the bills, but that the guarantee was *not* given to the *drawer*, but to the *acceptors*. He also observed, that the present case did not resemble cases where a bank gives a letter of credit, intended to be exhibited to all the world, and on the faith of which money is advanced (d). In such cases all the world is invited to trust to the representations of the persons who have given the letter, and therefore those persons are bound. Moreover, as the Lord Justice also pointed out, in the present case the person who had *secured the money* was not in fact the person who was interested at all in the guarantee. If the money had been paid it would have been a different thing. Then, said the Lord Justice, the bill holder might have raised his equity; but even then he could not raise it until he had given to the persons who so guaranteed notice of his claim, and until that time the persons who so guaranteed might deal with all the rights, as between him and the guarantors, in any way they thought fit.

While dealing with the subject of a surety becoming bankrupt, it should be observed that if the surety

Right of
creditors
to benefit of

(c) *Barneds Banking Co. In re Stephens*, L. R. 3 Ch. App. 753; *S. C.* 6 W. R. 1162.

(d) See *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391.

securities
received by
surety from
principal
debtor when
both
insolvent.

receives security from the principal debtor, and afterwards both these parties become insolvent, the creditors of the surety are entitled to regard such security as part of the property of the surety, and consequently are entitled to the benefit of it in discharge of their debts (a).

Holder of a
transferable
guarantee
from his
debtor to do
what he likes
with, is not
a secured
creditor *quâ*
such debtor's
estate.

It may be convenient also to mention, in this place, that, where a creditor receives a transferable guarantee from his debtor before bankruptcy of latter, not by way of mortgage or lien on his property but to do what he likes with it, he is not, *quâ* the estate of the bankrupt debtor, a *secured* creditor within s. 168 of the Bankruptcy Act, 1883, though the guarantee may be a security to him (b).

(a) *Loder's case*, L. R. 6 Eq. 491. And see *Re Walker, Sheffield Banking Co. v. Clayton*, 40 W. R. 327.

(b) *In re Hallett & Co., Ex parte Cocks, Biddulph & Co.*, (1894) 2 Q. B. 256.

CHAPTER V.

THE RIGHTS OF THE SURETY.

It is proposed to treat of the rights of the surety in the following order:—

Division of
this chapter.

- I. The Rights of the Surety against the Principal Debtor (*infra*).
- II. The Rights of the Surety against the Creditor (p. 317).
- III. The Rights of the Surety against his Co-sureties (p. 338).

I. *The Rights of the Surety against the Principal Debtor.*

Rights of
surety
against the
principal
debtor.

The surety possesses rights against the principal debtor, which, however, are not exactly the same as those possessed by the creditor against the debtor (*c*). Some of these exist before the surety has been compelled to pay anything under his guarantee, others after he has made payments thereunder, and before such payments have been refunded by the principal debtor; while others, again, are given to him for the very purpose of enabling him to recover back from the principal debtor sums which he has paid on his account.

The most important right which a surety possesses before any payment has been demanded of him is, that after the debt has become due he may compel the debtor to exonerate him from his liability, by at once paying the debt (*d*). To obtain this relief a surety

May compe
debtor to
exonerate
him from
liability.

(*c*) *Budeley v. Consolidated Bank*, 34 Ch. D. 536, 556. Thus, though a creditor who has recovered judgment against one partner cannot sue another partner, that rule does not take away the rights of a surety for one partner as against another partner. *Ib.*; and see *Kendall v. Hamilton*, 4 App. Cas. 504.

(*d*) *Per* Sir W. GRANT, M.R., in *Antrobus v. Davidson*, 3 Meriv. 569, 579; *Per* WILLES, J., in *Bechervaise v. Lewis*, L. R. 7 C. P. 372, 377; *Per* Lord THURLOW, in *Nesbit v. Smith*, 2 Brown, Ch. Ca. 579, 582;

must formerly have had recourse to a Court of Equity; and he should now resort to the Chancery Division, as being, since the Judicature Acts, the appropriate tribunal in such cases. "Although," says Lord Keeper *North*, in *Ranelaugh v. Hayes* (a), "the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this court will decree the principal to discharge the debt, it being unreasonable that a man should always have such a cloud hang over him." In *Lloyd v. Dimmack* (b) and *Hughes Hallett v. Indian Mammoth Gold Mines Co* (c), *Fry, J.*, refused to follow *Ranelaugh v. Hayes*, *supra*, stating, in the latter of the two cases, that it was the only authority which countenanced the view that a person possessing an indemnity can sue before the damage has accrued which gives rise to it. However, subsequent cases (d) have fully recognized this view, and, notably, the very recent case of *Wolmershausen v. Gullick* (e), where the right of one co-surety to be indemnified by another, before payment of the common liability, was established.

The only state of circumstances, however, under which a surety could sue his principal in equity to be discharged from his liability, was where the creditor had a right to sue the principal debtor, and refused to exercise such right (f).

Per Sir JOSEPH JEKYLL, M.R., in *Lee v. Brook*, Moseley, 318; *Cock v. Ravie*, 6 Ves. 283; *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Re the National Financial Co.*, 3 Ch. App. 791; *Lacey v. Hill*, L. R. 18 Eq. 182, 191. See also *Hayes v. Ward*, 4 Johns. New York Ch. Ca. 123, 132; *Hobbs v. Wayet*, 36 Ch. D. 256, 259; *Cruse v. Paine*, L. R. 4 Ch. App. 441; Lindley on Partnership, 5th ed., p. 374.

(a) 1 Vern. 189, 190.

(b) 7 Ch. D. 398.

(c) 22 Ch. D. 561.

(d) *Ex parte Snowden*, *Re Snowden*, 17 Ch. D. 44, 47; *Hobbs v. Wayett*, 36 Ch. D. at p. 258; *Johnston v. Salvage Association*, 19 Q. B. D. at p. 460; *Mathews v. Saurin*, 31 L. R. Ir. 181.

(e) (1893) 2 Ch. 514.

(f) *Padwick v. Stanley*, 9 Hare, 627; but see *Mathews v. Saurin*, 31 L. R. Ir. 181, where this case was disapproved of.

A mere surety for the price of goods cannot exercise the right of stoppage *in transitu* on the insolvency of the principal debtor (*g*). But if a surety for an insolvent buyer should pay the vendor, it would seem that he would now have the right of stoppage *in transitu*, if not in his own name, at all events in the name of the vendor, by virtue of the provisions of the 5th section (*h*) of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) (*i*). It has, moreover, been held in a modern case that a broker for an undisclosed principal, who is in the position of a surety, may, under certain circumstances, exercise this right. (*k*).

Right of surety to stop goods *in transitu* on principal's insolvency.

After any actual payment on account of the debt of the principal has been made by him, the surety is entitled to rank as a creditor for the amount, though only as a simple contract creditor (*l*). As, however, specialty debts and simple contracts now rank together in the administration of assets of a deceased person (*m*), the rank of debts to which the liability of a surety belongs is now of little importance. And now the Judicature Act, 1875 (*n*), provides that the insolvent estates of deceased persons are to be administered as in bankruptcy. In this connection, it may be mentioned that a surety who, after the death of the principal

Right of surety after payment on account of debtor to rank as creditor for amount so paid.

(*g*) *Siffkin v. Wray*, 6 East, 371. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) does not alter the law.

(*h*) See this section, *post*, p. 327.

(*i*) Benjamin on Sales, 4th ed., pp. 845, 846. The sections of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) which concern stoppage *in transitu* are 44, 45, and 46.

(*k*) *Imperial Bank of London v. The St. Katherine's Dock Co.*, 5 Ch. D. 195.

(*l*) *Copis v. Middleton*, T & R. 224; and see *per* STIRLING, J., in *Badeley v. Consolidated Bank*, 34 Ch. D. at p. 556.

(*m*) 32 & 33 Vict. c. 46.

(*n*) Section 10. This section does not introduce into the administration of insolvent estates of deceased persons the provision of s. 40 of the Bankruptcy Act, 1883, that all debts (with certain exceptions) are to be paid *pari passu*: *In re Maggi, Winehouse v. Winehouse*, 20 Ch. D. 545; *In re Williams, Jones v. Williams*, 36 Ch. D. 573.

debtor, pays off the debt, is, in case of intestacy, entitled to administration as a creditor (*a*); and that a surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate (*b*).

Surety's right
of retainer as
executor of
principal
debtor.

Should a surety be made executor under the will of the principal debtor, he is entitled to retain the amount which has been paid by him under his guarantee out of the assets of the principal against all creditors of *equal* degree (*c*), even though judgment for administration may have been obtained against him (*d*); for the right of indemnity belonging to an executor, who is surety for an unpaid debt of his testator, creates an equitable debt, in respect of which he may exercise the right of retainer (*e*). It seems, however, that the surety's right of retainer as executor can only be exercised against assets which come into his hands as executor (*f*). Therefore, where an executor, who had become surety for the testator on a promissory note, was not called upon to pay anything in respect of the suretyship until some years after the testator's death, and when there was no money in his hands which he could possibly retain, it was held that he had no right of retainer against assets paid over to the receiver, and which had never reached the hands of the executor (*f*).

No retainer
allowed by
surety of
assets
applicable to
payment of
principal
debt itself
and not

A surety, who is appointed executor, is not entitled to retain assets of the testator not required to indemnify him. On this subject reference may be made to *Lea v. Hinton* (*g*), where the facts were as follows:—One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the

(*a*) *Williams v. Jukes*, 34 L. J. Prob. & Mat. 60.

(*b*) *In re Lord Churchill, Manisty v. Churchill*, 39 Ch. D. 174.

(*c*) *Boyd v. Brooks*, 34 L. J. Ch. 605; 13 W. R. 419; 12 L. T. (N.S.) 38.

(*d*) *Re Orme, Evans v. Maxwell*, 50 L. T. 51.

(*e*) *In re Giles, Jones v. Penfather*, (1896) 1 Ch. 956; 44 W. R. 283.

(*f*) *In re Harrison, Latimer v. Harrison*, 32 Ch. D. 395.

(*g*) 5 De G. M. & G. 823.

life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal debtor died, having appointed his surety executor, and the surety received the insurance money. It was held, that to the extent to which the insurance money so received was not required for indemnifying the surety, it ought to be applied in payment of the debt.

A surety may sometimes retain moneys received by him otherwise than as executor of the principal debt.

In the very recent case of *In re Watson, Turner v. Watson (h)*, the executors of a surety were allowed to retain a portion of a legacy bequeathed to the principal debtor by the surety in satisfaction of sums paid by them after their testator's death, to the creditor. The facts of this case are as follows:—A surety for a mortgagor bequeathed to him a share of the residue of his estate, subject to the life interest of the testator's widow. After the death of the testator the mortgagor became bankrupt. He never obtained a discharge, and the bankruptcy was never closed. Neither the mortgagees nor the testator's executors proved in the bankruptcy. After the bankruptcy the executors made some payments to the mortgagees in pursuance of the testator's liability under his contract of suretyship. *Held*, that on the death of the tenant for life, the executors were entitled, notwithstanding the bankruptcy, to retain out of the mortgagor's share of the residue the amount of the payments which they had thus made to the mortgagees, with interest thereon at 4 per cent.

Again, it has recently been held that a surety for the good behaviour of a defendant in a criminal case (who has been required to find bail for a certain period) is entitled to retain as against such defendant the sum which he (the surety) has received by way of indemnity

required for indemnity.

Retainer by surety's executors of principal debtor's share of legacy bequeathed him by surety.

Right of retainer against indemnity moneys deposited with surety

by defendant
in a criminal
case.

against the defendant's default, as such payment is made under a contract which is contrary to public policy; and it is immaterial whether such contract has or has not been executed (a).

Surety may
compel
debtor to
repay him.

When the surety is desirous of compelling repayment from his principal of the sum which he has paid for him, the law provides him ample means of doing so. "When the engagement of the surety is made with the knowledge and consent of the principal debtor, there is, in point of law, an implied request from the latter to the surety to intervene on the principal's behalf if the latter makes default; and money paid by the surety for the purpose of discharging the claim against the principal is money paid for the use of the principal, at his request, which may be recovered from the latter (b).

But the
suretyship
must have
been
undertaken
at principal
debtor's
request.

The reason why the principal debtor is not chargeable to the surety, unless the engagement of the latter was made with the former's consent, *actual* or *constructive* (c), is because the *English law* does not allow a person to make himself the creditor of another by *volunteering* to discharge his obligation (d). Where, however, the surety, having entered into the suretyship at the request of the principal debtor, is called upon by

(a) *Herman v. Jeuchner*, 15 Q. B. D. 561; overruling in part *Wilson v. Strugnell*, 7 Q. B. D. 548.

(b) Addison on Contracts 9th ed., p. 1012, 1013, and see the judgment of Lord KENYON, C.J., in *Exall v. Partridge*, 8 T. R. 308, 310; *Warrington v. Furbor*, 8 East, 242; judgment of Lord BROUGHAM in *Hodgson v. Shaw*, 3 Myl. & Kee. 183, 190; *Morrice v. Redwin*, 2 Barnard 26; judgment of Lord ELDON, C., in *Wane v. Horwood*, 14 Ves. 28; *Kearsley v. Cole*, 16 M. & W. 128; *Boyd v. Brooks*, 34 L. J. Ch. 605. And see *Huntley v. Sanderson*, 1 Cr. & Mee. 467; *Davies v. Humphreys*, 6 M. & W. 153; *Reynolds v. Doyle*, 1 M. & G. 753.

(c) *Alexander v. Vane*, 1 M. & W. 511.

(d) *James v. Isaacs*, 12 C. B. 791; *Kemp v. Balls*, 10 Exch. 607; *Cook v. Lister*, 13 C. B. (N.S.) 543, 594; *Jones v. Broadhurst*, 9 C. B. 173, 193 to 198; *Belshaw v. Bush*, 11 C. B. 191. See also *Walter v. James*, L. R. 6 Exch. 124; 40 L. J. Exch. 104; 24 L. T. 188.

the creditor to pay the debt due from the principal debtor, the payment is treated as so much money paid to the use of the principal debtor. It can, therefore, be recovered from him in an action, or may be proved against his estate on his bankruptcy. In *Ex parte Bishop, In re Fox, Walker and Co. (c)*, it being proved to be the common and almost invariable practice of bill brokers in the City of London not to indorse each bill of exchange which may have been discounted for a customer when they re-discount it with their bankers, but to give the bankers a general guarantee for all bills which they re-discount with them, it was held that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and acceptor, the drawer, in discounting the bill with bill brokers in the City of London, has an implied authority from the acceptor to deal with them in the ordinary course of their business; and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee. It was also held that the bill brokers were entitled to prove against the estate of the acceptor for interest upon the amount which they had paid under their guarantee.

As a general rule, as soon as the surety had paid *anything* for the principal debtor, the latter becomes chargeable to him (*f*); and since, as often as he pays anything, a right of action accrues to him for the recovery back of the sum so paid, the surety cannot

Surety who has paid *any* portion of the debt has right of action against principal debtor.

(e) 15 Ch. D. 400.

(f) See *Davies v. Humphreys*, 6 M. & W. 153. And see *Taylor v. Mills*, Cowp. 525; *Paul v. Jones*, 1 T. R. 599.

accelerate the liability of the principal debtor by voluntarily paying the principal's debt before it is due (a).

Sometimes surety may be entitled to recover damages from principal debtor before making any payment.

Though, as just pointed out, the surety must have first paid something for the principal debtor in order to make the latter chargeable to him, yet it appears that, *by express contract*, the surety may, before payment, be entitled to recover *damages* from the principal debtor; where, for instance, the principal debtor has covenanted with the surety to pay the amount due to the creditor on a day named, and makes default (b).

What amounts to payment of money by surety.

It is sometimes necessary to consider, before suing the principal debtor for money paid to his use, whether what the surety has done in discharge of the principal's liability really amounts to a payment of money. The rule appears to be well settled, in *America*, that the giving by the surety of a *promissory note*, in payment of the debt guaranteed, is equivalent to a money payment by him when the creditor has accepted it, not *collaterally*, but as an actual payment (c). Whether the same rule prevails in *England* is, however, very doubtful (d). But it seems certain that the giving of a *bond* by the surety, in lieu of paying any money down, will not, in *either* country, operate as a money payment by the surety, until the payment of the bond (e). This seems to be only reasonable, as an *obligation* to pay is, obviously, not the same thing as actual payment. In short, a bond has no real analogy to cash. It seems, however, that if the goods of a surety are taken in

(a) Addison on Contracts, 9th ed., p. 1013.

(b) *Loosemore v. Radford*, 9 M. & W. 657. See also *Penny v. Fox*, 8 B. & C. 11, 14; *Toussaint v. Martinnant*, 2 T. R. 100; *Hodgson v. Bell*, 7 T. R. 97; *Martin v. Court*, 2 T. R. 640.

(c) Sedgwick's Measure of Damages, 6th ed., p. 379; *Cumming v. Hackley*, 8 J. R. 202; *Witherby v. Mann*, 11 J. R. 518.

(d) *Barclay v. Gooch*, 2 Esp. 571; *Rodgers v. Maw*, 15 M. & W. at p. 449; *McKenna v. Harnett*, 13 Ir. L. R. (o.s.) 206; *contra*, *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & Ald. 51.

(e) *Taylor v. Higgins*, *supra*; *Cumming v. Hackley*, *supra*; Sedgwick's Measure of Damages, 6th ed., p. 379.

execution, or distrained, for the debt of the principal, that it has the same effect as an actual payment of cash would have (*f*). At all events, where goods are lawfully seized for another's debt, or money is paid to prevent their being taken in execution, an action for money paid to the principal debtor's use is maintainable (*g*). It has, moreover, been held, in *America*, that an absolute conveyance of land by the surety will be sufficient to raise a claim on his behalf against the principal, to its full value, and that it will be treated as money paid to the use of the principal debtor (*h*).

The right of the surety to sue the debtor the moment he has paid *anything* for the debtor is certainly calculated to produce a hardship upon the principal debtor, by exposing him to several actions at the suit of the surety. But, however convenient it might be to limit the number of actions in respect of one suretyship, there is certainly no rule of law which requires the surety to pay the whole debt of the principal debtor before he can call for reimbursement (*i*).

Hardship entailed by right of surety to sue principal for each payment made on latter's behalf.

The action by the surety for money paid on the debtor's account lies, *even though the surety did not pay the debt by the desire of the principal debtor* (*k*). Such an action may, it seems, be commenced by specially indorsed writ (*l*), in which the debt and costs which the surety has been compelled to pay by the default of the principal debtor may be claimed (*m*). The mode in which the suretyship arose should be

This right available though payment made otherwise than by principal's desire.

(*f*) *Rodgers v. Maw*, 15 M. & W. 444.

(*g*) *Edmonds v. Wallingford*, 14 Q. B. D. 811; and see *Exall v. Partridge*, 8 T. R. 308.

(*h*) *Ainsley v. Wilson*, 7 Cow. 662; *Bonney v. Sceley*, 2 Wend. 481; Sedgwick's Measure of Damages, 6th ed., p. 379.

(*i*) *Per* PARKE, B., in *Davies v. Humphreys*, 6 M. & W. 153, 167.

(*k*) *Exall v. Partridge*, 8 T. R. 308; *Warrington v. Furber*, 8 East, 242. See also *Alexander v. Vane*, 1 M. & W. 511.

(*l*) *Ante*, pp. 226 *et seq.*, as to special indorsement, and see Annual Practice, 1897, p. 223.

(*m*) *Borland v. Curry*, 4 L. R. Ir. 273.

stated in the indorsement (a). It frequently happens, however, that the surety takes from the principal debtor a bond as a security or indemnity. If he do this, the remedy of the surety is on the bond (b). A bill of sale given by way of indemnity to a surety is void because the form in the Schedule to the Bills of Sale Act, 1882, is not applicable to such a security (c). Where a counter-security is given to a surety by a principal whose good behaviour he has guaranteed, such counter-security, being held by way of indemnity only, reverts to the principal on the surety being discharged from liability (d). In no case is the creditor entitled to the benefit of a counter-security received by the surety from the principal debtor (e).

What the
surety can
recover from
principal
debtor.

He can
always
recover the
amount
which he has
actually paid.

With regard to *what* the surety can recover against the principal debtor, one or two points are to be noticed.

It is clear that the surety is entitled to recover the amount which he has actually paid with interest (f). Moreover, if a surety can prove that, by reason of the non-payment of the debt guaranteed, he has suffered damage *beyond* the principal and interest which he has been compelled to pay, he will, it seems, be entitled to recover that damage from the principal debtor (g). But a surety who compounds a debt for which his principal and himself have become jointly liable, and takes an assignment of that debt to a trustee for

(a) *Ahern v. O'Donovan*, 15 Ir. L. T. 17.

(b) *Toussaint v. Martinnant*, 2 T. R. 100, 104; and see *Houle v. Baxter*, 3 East, 177.

(c) *Hughes v. Little*, 18 Q. B. D. 32, C. A.; but see *Sibley v. Higgs*, 15 Q. B. D. 619.

(d) *M'Mahon v. Featherstonhaugh*, (1895) 1 Ir. R. 182.

(e) *In re Walker, Sheffield Banking Co. v. Clayton*, (1892) 1 Ch. 621.

(f) *Petre v. Duncombe*, 20 L. J. (N.S.) Q. B. 242.

(g) *Per STIRLING, J.*, in *Badeley v. Consolidated Bank*, 34 Ch. D. at p. 556. Bail may recover any reasonable expenses they may have incurred in taking their principal into custody for the purpose of surrendering him : *Fisher v. Fallows*, 5 Esp. 171.

himself, can only claim against his principal the amount which he has actually paid (*h*).

A surety is entitled to recover *interest* from the principal debtor, because the surety is entitled to be indemnified against loss which he has sustained through the default of the principal debtor (*i*). The cases upon direct contracts for the payment of money which omit mention of interest are well distinguished, on the ground that the intention of the parties is presumed to be *expressed* in the terms of their contract (*k*).

Is entitled to claim interest.

A surety for a company who pays money on behalf of the company is not in a worse position than a stranger who advances money, but is entitled, on the winding-up of the company, to interest at 5*l.* per cent. on his debt (*l*). However, a surety for a *company* cannot, after an order to *wind up* the company has been made, be admitted to prove in respect of interest accruing *after* the said order upon payments made by the surety for the company (*m*). This is because an order to wind up a company fixes the right of its creditors and nullifies, as between them, all contracts for interest (*m*). After an order to wind up has been made, the proper course for a surety for the company seeking to recover interest (subsequently accrued due) to adopt, is to take a claim into chambers for the established value of his right to indemnity at the time when the winding-up order was made (*m*). It would seem, too, that in such a case the claim for interest should be made against the surplus assets of the company after all its debts (*quâ* principal moneys) are paid (*m*). Where a company is being wound up under

Surety for a company which is being wound up entitled to interest.

(*h*) *Reed v. Morris*, 2 Mylne & C. 361 ; 1 Jur. 233.

(*i*) *Per* ERLE, C.J., in *Petre v. Duncombe*, 20 L. J. Q. B. 242.

(*k*) *Ib.*

(*l*) *In re Beulah Park Estate, Sargood's claim*, L. R. 15 Eq. 43.

(*m*) *In re International Contract Co., Hughes' claim*, L. R. 13 Eq. 623 ; and see *Warrant Finance Co's case*, L. R. 4 Ch. App. 643 ; *Ebbw Vale Co.'s case*, L. R. 5 Ch. App. 112.

supervision, no interest can be proved for after the date of the confirmatory resolution to wind up voluntarily (a).

Right of a surety to recover from principal debtor costs of defending actions.

The surety cannot, it appears, as a general rule, recover from the principal debtor the costs of *defending* an action unless he was authorized by the principal debtor to defend (b). However, it has recently been held, that when a man has defended an action for a claim, for which another is liable over to him, his right to recover the costs incurred in the defence depends on the *reasonableness* of that defence, and that is a question for the jury (c). Moreover, where the plaintiff guaranteed A. that the defendant would, upon demand, from time to time, pay to A. what should be due, and, upon defendant making default, a writ was issued against the plaintiff for the amount, the writ being the first notification to him of the amount being due and unpaid: it was held, that the plaintiff having allowed judgment to go by default, and an execution to be levied upon his goods, might recover against the defendant the *costs of the writ* at the suit of A. but *not* of the subsequent proceedings (d). Where a surety is, under the circumstances of the case, entitled to recover from the principal debtor the costs of defence, it seems that he is entitled to both the extra costs paid by him to his solicitor and the taxed costs (e).

His claim not limited to taxed costs.

(a) *In re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478.

(b) *Gillett v. Rippon*, Mood. & M. 406. See also *Smith v. Compton*, 2 B. & Ad. 407; *Duffield v. Scott*, 3 T. R. 374, 377; *Roach v. Thompson*, Mood. & Malk. 487; but see *per* QUAIN, J., in *Baxendale v. London, Chatham, and Dover Railway*, L. R. 10 Ex. 35, 44.

(c) *Mors le Blanc v. Wilson*, L. R. 8 C. P. 227; 21 W. R. 109; disapproved of by QUAIN, J., in *Baxendale v. London, Chatham, and Dover Railway*, *supra*; *Fisher v. The Val de Travers Asphalte Co.*, 1 C. P. D. 511; but see *Broom v. Hall*, 7 C. B. (N.S.) 503; *Hammond & Co. v. Bussey*, 20 Q. B. D. 79, C. A.; *Howard v. Lovegrove*, L. R. 6 Ex. 43.

(d) *Pierce v. Williams*, 23 L. J. Exch. 322.

(e) *Howard v. Lovegrove*, *supra*.

If a surety make a payment in respect of a claim known by him to be illegal or void for fraud or immorality, he cannot, it seems, recover in respect of such a payment from the principal debtor (*f*). He is not, however, it would appear, bound to resist the creditor's claim if he have no defence; he may make the best compromise he can, and then recover the loss which he has incurred (*g*).

Surety cannot, *semble*, recover from principal debtor payments knowingly made by him in respect of an illegal or fraudulent claim.

The defences which may be set up in an action by a surety against the principal debtor are, of course, numerous, and vary with the circumstances of each case. The defences of payment and of the Statute of Limitations, however, require a few words of notice.

Defences by principal debtor to surety's action.

Payment in full to the creditor by the principal debtor, if made in proper time, will, of course, always afford a sufficient defence to an action brought by the surety against the principal debtor. But, where there are several sureties, it is apprehended that payment by the principal debtor to *another* of the sureties would not be an answer to such an action (*h*).

Payment in full made to creditor.

The Statute of Limitations may bar the surety's right of action against the principal debtor (*i*). It begins to run against a surety as soon as he has made a payment *in case* of the principal debtor (*k*). That is to say, *at common law*, at all events, time runs from *actual payment* by the surety, and not from the time when he became merely *liable to pay* (*l*). It is submitted, however, that, as the surety is, *in*

Statute of Limitations may bar surety's right of action against principal debtor.

(*f*) *Bryant v. Christie*, 1 Stark. N. P. R. 239.

(*g*) *Lord Newborough v. Schroder*, 7 C. B. 342, 399; Mayne on Damages, 5th ed., p. 329.

(*h*) See the *American* case of *Lowry v. Lumbermen's Bank*, 2 Watts. & Serg. R. 210.

(*i*) See *American* cases of *Eager v. Commonwealth*, 4 Mass. T. R. 182; *Thayer v. Daniels*, 110 Mass. 345.

(*k*) *Davies v. Humphreys*, 6 M. & W. 153.

(*l*) *Angrove v. Tippet*, 11 L. T. (N.S.) Q. B. 708.

equity (a), entitled to require the debtor to discharge the plaintiff's debt when the time for payment thereof has arrived (b), the statute may possibly begin to run against the surety as soon as he can compel payment by the principal debtor, and will not begin to run afresh if and when actual payment has been made, and loss has been sustained (c).

Rights of surety against principal debtor on latter's bankruptcy :
Could not formerly prove unless he paid debt before debtor's bankruptcy.

Let us now see what are the rights of the surety against the principal debtor on the *bankruptcy* of the latter.

We have seen that the surety does not become a creditor of the principal debtor until he has paid something on his account. It was, therefore, formerly held, that, unless the surety paid the debt of the principal *before* the bankruptcy of the latter, he could not come in as a creditor under the commission (d). And, accordingly, where a surety in a bond paid the debt *after* a commission of bankruptcy issued against his principal, it was held, that his right of action against his principal for the money so paid was *not barred* by the certificate, though the penalty of the bond was forfeited *before* the bankruptcy (e).

Right of proof conferred by 49 Geo. 3, c. 121, s. 8.

The statute 49 Geo. 3, c. 121, s. 8, first enabled a surety paying the debt of his principal *after* the bankruptcy of the latter, to prove against his estate. Subsequent statutes re-enacted this provision (f).

(a) The Judicature Act, 1873, s. 25 (11), provides that in case of conflict between law and equity, the rules of equity shall prevail.

(b) See *ante*, pp. 299, 300, and cases there cited.

(c) See Hewitt's Statutes of Limitation, p. 15, 16; *Reeves v. Butcher*, (1891) 2 Q. B. 509, 511.

(d) *Paul v. Jones*, 1 T. R. 599; *Brooks v. Rogers*, 1 Bl. H. 640; *Taylor v. Mills*, Cowp. 525. See also *Goddard v. Vanderheyden*, 3 Wilson, 362; *Young v. Hockley*, 3 Wilson, 346.

(e) *Taylor v. Mills*, Cowp. 525; and see the judgment of Lord MANSFIELD in this case.

(f) 6 Geo. 4, c. 16, s. 52; 6 Geo. 4, c. 168; and 12 & 13 Vict. c. 106, s. 173 (B. A. 1849).

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) (*g*), did not contain any section enabling a surety to prove in the bankruptcy of his principal. Nor is any provision as to proof by sureties to be found in the Bankruptcy Act, 1883, or in the Rules framed under it. A surety's right of proof would seem, therefore, still to depend upon previous enactments (*h*). We will, therefore, examine some of the cases decided under these older enactments.

The B. A. 1869 and 1883 do not expressly confer right of proof in respect of payments made by surety after principal debtor's bankruptcy.

Where a person who retired from a partnership upon an undertaking of his partner to pay the outstanding debts, was afterwards, upon the partner's becoming bankrupt, obliged to pay some of the partnership debts, it was held that he was entitled to prove as a surety (*i*). Mere *liability* to pay the outstanding partnership debts would not, however, constitute the retiring partner a surety (*k*). And it was decided, in the case of *Hoare v. White* (*l*), that s. 173 of the Bankruptcy Act, 1849, applied only to persons under a *personal* liability to pay.

Decisions on previous enactments must therefore be considered.

Moreover, under the enactments we are now considering, in order to entitle the surety to prove, it is necessary that the debt of the principal should be *actually due* at the time of the issuing of the commission. Thus, where a man was surety for the payment of a trader's rent, and no rent was due at the time of the bankruptcy, it was held, that, though the surety

Under these enactments no right of proof till principal's debt actually due.

(*g*) Repealed by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 169, Fifth Sched.

(*h*) See observations on this subject in Robson's Law of Bankruptcy, 7th ed., p. 305; and see Baldwin's Law of Bankruptcy, 7th ed., p. 445, note (*o*).

(*i*) *Wood v. Dodgson*, 2 M. & S. 195; 2 Rosc. 47. See also *Parker v. Ramsbottom*, 5 D. & R. 138; *Wallis v. Swinburne*, 1 Ex. 203.

(*k*) *Abbott v. Hicks*, 7 Scott, 715; 5 Bing. N. C. 578.

(*l*) 3 Jur. (N.S.) 445.

paid the rent afterwards accruing, he could not prove for the amount (a).

Nor till
whole debt
guaranteed
satisfied.

The surety, too, was not entitled to prove until the *whole* debt was satisfied (b), *i. e.*, either by payment in full or by payment of part in discharge of the whole (c); or by payment of all that remained due to the creditor (d). Where a surety in a bond for the bankrupts, after the bankrupts were certificated, joined with them and a new surety in a new bond to the representatives of the creditor, and the old bond was delivered up to the surety: it was held, that this transaction did not amount to payment by the surety within Sir S. Romilly's Act (49 Geo. 3, c. 121, s. 8), so as to enable the surety to prove under the commission (e). So, again, where a surety paid part of the debt due from the principal, and thereupon the creditor gave him an indemnity from personal liability as to the remainder, it was held, that this did not operate as a payment of *part* in discharge of the *whole*, within 49 Geo. 3, c. 121, s. 8 (f). "The object of the statute is very plain. If the surety pays the whole of the debt, the original creditor is entitled to no advantage under the commission; but if he only pays a part, it operates merely as a discharge of the debt *pro tanto*; and the surety is at liberty, if he pleases, to stand in the situation of the original creditor in respect of the part he has paid, and is to have the benefit of such dividends as the bank-

(a) *M'Dougal v. Paton*, 2 Moore, 644; 8 Taunt. 584. See also *Ex parte Minet*, 14 Ves. 189.

(b) *Semble* now he can prove *before* payment, see *infra*.

(c) *Young v. Taylor*, 8 Taunt. 315; *Ex parte Coplestone*, 4 Dea. 54. See also observations of BULLER, J., in *Paul v. Jones*, 1 T. R. 599, 600; *Kittier v. Raynes*, Cox, 105; *Martin v. Brecknell*, 3 M. & S. 39.

(d) *Ex parte Johnson*, 3 De G. M. & G. 218; *Ex parte Coplestone*, 4 Dea. 54.

(e) *Ex parte Serjeant*, 2 G. & J. 23.

(f) *Soutten v. Soutten*, 2 D. & Ry. 521; and see *Ex parte Turquand*, *In re Fothergill*, 3 Ch. D. 445; 45 L. J. Bank. 153.

rupt's estate produces" (g). However, since a surety by bond for advances generally, but under a limited penalty, is not liable beyond the amount of such penalty, on paying such amount he is only entitled to a proportion of the dividends on the proof by the creditor to a greater amount under the bankruptcy of the principal debtor (h).

That a surety could always, and can now, prove for anything actually *paid* by him *before* the bankruptcy of the principal debtor is, it is conceived, beyond doubt (i). It would seem, however, that, under s. 37 of the Bankruptcy Act, 1883, a surety has now a right of proof against the principal debtor *before* he has paid the debt for which he is surety, at least where there is no probability of double proof being made (k). He is, however, not entitled to prove, for the purpose of voting at the first meeting of creditors, unless he has paid the debt for which he is surety (l).

Seemle, that under s. 37 of B. A. 1883, surety may prove *before* actual payment against estate of defaulting debtor.

A surety was entitled to prove for costs and expenses incurred by him in consequence of the principal's default, if such costs would have been properly payable by the debtor. And it was held that the certificate under 49 Geo. 3, c. 121, s. 8, was a bar, not only to the principal debt, but also to any consequential damage arising from that debt not having been duly paid (m).

Surety's right to prove for costs and expenses incurred by him.

(g) *Per curiam*, in *Soutten v. Soutten*, 2 D. & Ry. 521. See further, *Ex parte Johnson*, 3 De G., M. & G. 218.

(h) *Ex parte Rushforth*, 10 Ves. 409. See also *Paley v. Field*, 12 Ves. 435; *Ex parte Turner*, 3 Ves. 243.

(i) *Ex parte Rushforth*, 10 Ves. 415; *Paley v. Field*, 12 Ves. 430; Robson's Law of Bankruptcy, 7th ed., p. 306.

(k) *Ex parte Delmar, Re Herepath*, 38 W. R. 752; 7 Morrell 129, 190; *Wolmershausen v. Gullick*, (1893) 2 Ch. 514, where it was held that the liability of a bankrupt co-surety to contribute, though unascertained at the time of the bankruptcy proceedings, is a debt provable in the bankruptcy. Baldwin's Law of Bankruptcy, 7th ed., p. 445; but see *Ex parte Whittaker, Re Parrott*, 39 W. R. 400, and Robson's Law of Bankruptcy, 7th ed., p. 306, note (q).

(l) *Ex parte Whittaker, Re Parrott, supra*.

(m) *Van Sandau v. Corsbie*, 3 B. & Ald. 13.

Avoidance of fraudulent preference of surety by bankrupt principal debtor.

It has recently been held that a surety who has a right of proof under s. 37 of the Bankruptcy Act, 1883, in respect of his contingent liability, is a "creditor" within the meaning of s. 48 of the Act which avoids fraudulent preferences, and therefore a payment made by a principal debtor to or for the benefit of his surety, before he has been called upon to pay as surety, may be a fraudulent preference (a).

Substitution of promissory note for bond debt by surety and creditor, held not to destroy surety's right of proof against principal debtor's estate.

Where a bond creditor, without the knowledge of the principal, gave up the bond to the surety and received in satisfaction for it the promissory note of the surety for the sum remaining due, it was held that the dealings between the creditor and surety had not taken away the rights of the surety against the bankrupt principal debtor, and that the surety was entitled to prove against the principal's estate (b).

Where a surety acquires the benefit of the creditor's securities, they must first be applied in recovering the debt, and proof made only for the deficiency (c).

It has been decided that the court will marshal securities in favour of a surety for the repayment of money advanced on mortgage against the assignee in bankruptcy of the principal debtor [the mortgagor] (d).

Till he has paid something the surety cannot petition for winding up of the company for which he is bound.

Where the principal debtor is a company, the remedy, in case of its insolvency, is to wind it up. On this subject it has been held that a surety for a company is not entitled to present a winding-up petition, under s. 82 of the Companies Act, 1862 (25 & 26 Vict. c. 89), until he has been called upon to pay *something*, as till

(a) *In re Paine, Ex parte Reed*, (1897) 1 Q. B. 122.

(b) *Ex parte Allen*, 3 De G. & J. 447.

(c) *Ex parte Sherrington*, 1 M. D. & D. 195; Robson's Law of Bankruptcy, 7th ed., p. 303.

(d) *Hayman v. Dubois*, L. R. 13 Eq. 158; 41 L. J. Ch. 224; 25 L. T. 558; and see *Ex parte Salting, In re Stratton*, 25 Ch. D. 148, where securities were marshalled in favour of a person who, though not a surety, was held to stand in that position. *Ex parte Alston*, L. R. 4 Ch. App. 168.

then, he is not a creditor within the meaning of that section (e). Where, however, he has paid the debt after the order for winding up, he is entitled to set off against a debt due from him to the company, an equal amount of the money due from the company on a promissory note in the hands of the guaranteed creditor (f).

II. *The Rights of the Surety against the Creditor.*

Before considering this subject, there is one observation to be made, namely, that if a creditor, with knowledge that a person is intending to be surety, accepts the instrument or security which pledges his liability, the rights of suretyship attach upon the transaction: knowledge and acceptance, in such cases, amounting to the same thing (g). Moreover, it has recently been held by the Court of Appeal, in *Rouse v. Bradford Banking Co.* (h), that if a creditor has two principal debtors, one of whom, by subsequent arrangement between themselves, to which the creditor is no party, and does not assent, becomes primarily liable for the debt, and such arrangement is notified to the creditor, the one *secondarily* liable has, thenceforth, the *rights of a surety against the creditor*. This decision of the majority (i) of the Court of Appeal (which, however, need not have been given, having regard to the other point decided by them), tends rather to inflict

The rights of the surety against the creditor. When the creditor accepts instrument under which the liability of the surety arises, the rights of suretyship attach to the transaction. By subsequent agreement *inter se* communicated to the creditor one of two principal debtors may become a surety with rights of one.

(e) *In re Vron Colliery Co.*, 20 Ch. D. 442, C. A.; and see *In re Law Courts Chambers Co.*, 61 L. T. 669. As to what can be recovered by the surety in the winding up proceedings, see *ante*, p. 309, and see also *post*, p. 334.

(f) *Barrett's case*, 4 De G. J. & S. 756.

(g) *Wythes v. Labouchere*, 5 Jur. (N.S.) 499, 500; *White v. Corbet*, EL. & EL. 692; *Hollier v. Eyre*, 9 Cl. & F. 1.

(h) (1894) 2 Ch. 32, C. A.; *Semble* overruling *Swire v. Redman*, 1 Q. B. D. 536; and following *Oakeley v. Pasheller*, 2 Cl. & F. 207; 10 Bli. (N.S.) 548; *Oakford v. European and American Steam Shipping Co.*, 1 H. & M. 182, 190; and *Overend, Gurney, & Co. v. Oriental Financial Corporation*, L. R. 7 H. L. 348.

(i) *i.e.* LINDLEY & KAY, L.JJ., SMITH, L.J. dissenting.

hardship on the creditor, whose position is thus altered by two parties without his consent, or having any option in the matter. It is submitted that, especially when a bank is the creditor, it might be as well to stipulate expressly in the deed or agreement under which the liability of joint debtors arises, that no debtor shall have the rights of a surety or alter his position in any way, either towards his co-debtor or towards the creditor, without the latter's express consent previously obtained.

Division of
the subject.

In discussing the rights of the surety against the creditor, it will be convenient to consider the rights of the surety against the creditor *before* he has been called upon to make any payment under his guarantee; next, the rights possessed by the surety *when* he is called upon to pay; and, lastly, the rights which the surety possesses *after* he has made a payment under his engagement to do so.

Rights of
surety
against
creditor
before
payment.
To compel
creditor to
sue for and
collect the
debt.

Before any demand for payment has been made upon him, and as soon as the debt of the principal debtor becomes due, the surety may, it seems, compel the creditor to sue for and collect such debt (*a*). At least, if the surety will undertake to indemnify the creditor for the risk, delay and expense he thereby incurs (*b*), and he is able to show that, at the time he requested the creditor to sue the debtor, the latter was solvent and able to pay the debt (*c*). It has been remarked that this equitable jurisdiction would appear to preclude the surety from the right to notify the creditor to proceed against the defaulting debtor, and, upon the failure

(*a*) *Boulton v. Stubbs*, 18 Ves. 20. *Per* A. L. SMITH, L.J., in *Rouse v. Bradford Banking Co.*, (1894) 2 Ch. at p. 75. *Per* Lord ELDON in *Wright v. Simpson*, 6 Ves. 714, 733; and see the *American* cases of *King v. Baldwin*, 2 Johns. Ch. Cas. 554, and *Hayes v. Ward*, 4 Johns. Ch. Cas. 122, 131.

(*b*) *Wright v. Simpson*, 6 Ves. at p. 734; Story's Equity Jurisprudence, English edition, by Grisby, pars. 327, 849.

(*c*) *Wheeler v. Benedict*, 43 New York S. C. Rep. 478.

of the creditor to do so, to stand released from all liability (d). And it has been decided recently in *America* that a surety is not released by the creditor's neglect to sue the principal *upon request*, although the principal afterwards become insolvent (e).

Moreover, if a surety has given a bond for the good behaviour of another in an employment, and, after the giving of such bond, the employed is guilty of defaults or breaches of duty for which the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him (f).

Again, it sometimes happened that a surety was, in equity, discharged from all liability, but remained liable at law. Formerly, in such a case, the court of equity would restrain the creditor from proceeding at law against the surety (g). But the Judicature Act, 1873, now provides that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto (h).

In some cases, also, a court of equity would set aside and cancel the instrument under which the surety's liability arose (i). This jurisdiction is now

(d) *Per* WADE, C.J., in *Smith v. Freyler*, 47 Amer. R. at p. 361 (U. S.).

(e) *Smith v. Freyler*, *ubi supra*.

(f) *Sanderson v. Ashton*, L. R. 8 Exch. 73; *Phillips v. Foxall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 27 L. T. 231; 20 W. R. 900; *Burgess v. Eve*, L. R. 13 Eq. 450; but see *Byrne v. Muzio*, 8 L. R. Ir. 396, Ex. D. As to when the surety is entitled to notice of dishonesty of servant, see *post*, pp. 381, 382.

(g) *Hawkshaw v. Parkins*, 2 Swanst. 539, 544; *Samuel v. Howarth*, 3 Mer. 272; *Small v. Currie*, 5 D. M. & G. 141; 2 Drew. 102; *Allan v. Inman*, 7 Jur. 433. See also Story, Eq. Jur., 9th ed., pars. 883, 883a.

(h) 36 & 37 Vict. c. 66, s. 24 (5). (i) *Blest v. Brown*, 3 Giff. 450.

The Chancery Division of High Court will now exercise this jurisdiction.

specially assigned to the Chancery Division of the High Court (*a*). In this connection it should be stated that where, by the construction of the terms of a guarantee, there is no right of contribution amongst the sureties, any one of them may sustain an action to set aside the guarantee for fraud without making his co-sureties parties (*b*).

The rights of surety when called upon to pay.

The rights which the surety possesses when called upon to pay do not call for notice at length. Of course there are a great variety of defences, any one or more of which may be open to the surety; but, as such defences are of common occurrence in other actions, they need no special remarks here. There are only two matters of defence which it is necessary to make special mention of.

Surety entitled to benefit of set-off which principal debtor had against creditor.

Formerly, if the creditor sued the surety on his guarantee, the surety might have pleaded equitably a set-off which the principal debtor had against the creditor (*c*). And now, by virtue of the Judicature Act, 1873, where a defence shows grounds entitling the defendant in equity to be relieved against a contract sought to be enforced by the plaintiff, any Division in which the action is pending may give effect to the equitable defence, at least so far as to treat it as a defence to the action (*d*). It has recently been held, in *America*, that in an action by the assignee of a claim, damages for breach of contract by plaintiff's assignor are available to a surety of the party damaged as a set-off, though not as a counter-claim in extinguishment of the plaintiff's claim (*e*).

(*a*) Judicature Act, 1873, s. 34 (3).

(*b*) *Pendlebury v. Walker*, 4 Y. & C. 424.

(*c*) *Murphy v. Glass*, L. R. 2 P. C. 408; *S. C.* 6 Moo. P. C. (N.S.) 1; 20 L. T. (N.S.) 461; 17 W. R. 592. See also *Bechervaise v. Lewis*, 20 W. R. C. P. 726; *S. C.*, 41 L. J. C. P. 161; 26 L. T. 848; L. R. 7 C. P. 372; *Newton v. Lee*, 76 New York S. C. R. 90.

(*d*) 36 & 37 Vict. c. 66, s. 24 (2); *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145.

(*e*) *Newton v. Lee*, 76 New York S. C. R. 90.

The other matter of equitable defence against a claim under the guarantee requiring notice is, the surety's right to compel a creditor having a claim upon two funds, one of which the surety cannot make available, to resort to the latter fund *first* (f). Surety's right to compel creditor to resort first to the fund which is not available to surety.

The rights which a surety possesses against the creditor after he has been called upon to pay the debt are of considerable importance. In general terms it may be stated that, upon payment of the principal's obligation, the surety becomes subrogated to all the rights of the principal in respect thereto (g). Rights of surety after payment.

If, in ignorance of the facts, he has paid the creditor *that which he was not liable to pay*, the surety is entitled to recover the amount so paid (h). If, however, a surety were to make an improper payment *in ignorance of law, and not of fact merely*, it is presumed that he could not recover it back, for "*ignorantia legis neminem excusat*" (i). To recover sum paid to creditor in ignorance of fact.

Assuming no such question as this to arise, another right is, that he is entitled to the benefit of all the securities, whether known to him (the surety) or not (k), which the creditor has against the principal (l). To benefit of all securities held by creditor.

(f) *Ex parte Kendall*, 17 Ves. 514.

(g) *Tobin v. Kirk*, 80 New York S. C. R. 229.

(h) *Mills v. Alderbury Union*, 3 Exch. 590.

(i) Money paid under a mistake of law to an officer of court (e.g. to a trustee in bankruptcy) will be directed to be refunded: *Ex parte Simmonds, In re Carnac*, 16 Q. B. D. 308, C. A.

(k) *Duncan, Fox & Co. v. North and South Wales Bank*, 16 App. Cas. 1; *Mayhew v. Crickett*, 2 Swanst. 185, 191; *Pearl v. Deacon*, 24 Beav. 186. See also *Scott v. Knox*, 2 Jones (Ir.), 778; *Hodgson v. Shaw*, 3 Myl. & Kee. 183; *Yonge v. Reynell*, 9 Hare, 809; *Merchants' Bank of London v. Maud*, 18 W. R. 312; 19 W. R. 657.

(l) *Ex parte Crisp*, 1 Atk. 133; *Sir Daniel O'Carroll's case*, Amb. 61; *Goddard v. Whyte*, 2 Giff. 449; *Per LINDLEY, L.J., in In re Sir J. Ennis, Coles v. Peyton*, (1893) A. C. at p. 243; *Brandon v. Brandon*, 3 De G. & J. 524; *Parsons v. Briddock*, 2 Vern. 608. Observations of WILLES, J., in *Bechervaise v. Lewis*, 20 W. R. C. P. 726; 41 L. J. C. P. 161; 26 L. T. 848; L. R. 7 C. P. 372. See also *Benedict v. Rea*, 42 New

and where the creditor has, by his own act, rendered unavailable part of the security, to the benefit of which the surety is entitled, the latter will be discharged *pro tanto* (a). For it is the duty of the creditor, as soon as the surety has paid the debt, to make over to him all the securities which he (the creditor) holds, in order that the surety may recoup himself (b). In the case of a person who becomes surety for a limited amount of a debt, he has, on payment of the amount for which he is liable, all the rights of a creditor in respect of that amount, and is entitled to a share in the security held by the creditor for the whole debt (c). A surety for part of a debt is not, however, entitled to the benefit of a security given by the debtor to the creditor, at a different time, for *another* part of the debt (d). On the other hand, a surety paying off the debt is entitled to the benefit of a security given without his knowledge by the debtor to the creditor, at a different time, to secure another demand *in addition* to that for which he became surety (e).

Nature of
this right.

This right of the surety to the benefit of all the securities held by the creditor is not necessarily dependent upon contract, but is the result of the equity of indemnification attendant on the suretyship (f); and it can be exercised even where the only suretyship is

York S. C. R. 34; *Craythorne v. Swinburne*, 14 Ves. 160; *Wright v. Morley*, 11 Ves. 12; *Ex parte Rushforth*, 10 Ves. 409; *Pledge v. Buss*, Johns. 663; *Robinson v. Wilson*, 2 Madd. 434; *Strange v. Fooks*, 4 408; *Hodgson v. Shaw*, 3 Myl. & Kee. 183; *Swain v. Wall*, 1 Ch. Rep. 80.

(a) *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Taylor v. Bank of New South Wales*, 11 App. Cas. at p. 603; see *post*, p. 446, as to discharge of surety by loss of securities.

(b) *Per* COCKBURN, C.J., in *Wulff v. Jay*, L. R. 7 Q. B. 756; 41 L. J. Q. B. 322; 27 L. T. 118; 20 W. R. 1030.

(c) *Goodwin v. Gray*, 22 W. R. 312. (d) *Wade v. Coope*, 2 Sim. 155.

(e) *Scott v. Knox*, 2 Jones (Ir.), 778.

(f) *Duncan, Fox & Co. v. North and South Wales Bank*, 6 App. Cas. 1; 11 Ch. D. 88; 50 L. J. Ch. 355; 43 L. T. 706; 29 W. R. 763.

created by indorsing a bill of exchange in order to get it discounted (*g*). It seems, however, that, during the currency of a bill of exchange, the indorsers are not sureties to the indorsees, nor have they any equity to prevent an indorsee from dealing as it may seem to him most desirable with any other parties, unless thereby he prevents himself from giving notice of dishonour, so as to give them their remedy against prior parties to the bill (*h*). Thus it would seem that, where bankers are holders of a bill accepted by a customer, and indorsed by a third person, they will not be incapacitated from carrying on their dealings with that customer by varying the securities received from him according to the ordinary course of those dealings as long as he remains solvent, and before the acceptance has been dishonoured (*i*).

This right extends, and the surety is entitled, to securities given *after* the contract of suretyship (*k*). And, therefore, where the creditor has so dealt afterwards with such security that on payment by the surety it cannot be given up to him in the same condition as it was when the creditor first acquired it, the surety is discharged to the extent of such security (*l*). And so, also, the surety is entitled to a transfer of any mortgage which the creditor may have taken for his debt, even though the surety was not originally aware of its existence (*m*). But, upon the other hand, a surety is sometimes not entitled to an assignment from the creditor of a mortgage, unless he

Surety
entitled to
securities
given *after*
the contract
of suretyship.

Right of
surety to
transfer of
mortgages

(*g*) *Duncan, Fox & Co. v. North and South Wales Bank*, *supra*.

(*h*) *Ib.*, *Per* BLACKBURN, Lord, at p. 18 of 6 App. Cas.

(*i*) *Ib.*, *Per* SELBORNE, L.C., at 15 of 6 App. Cas.

(*k*) *Forbes v. Jackson*, 19 Ch. D. 615, 621; *Pledge v. Buss*, Johns. 663; *Lake v. Brutton*, 25 L. J. Ch. 842; 2 Jur. (N.S.) 839; *contra* *Newton v. Chorlton*, 10 Hare, 646; 2 Drew. 333; *Pearl v. Deacon*, 24 Beav. 186.

(*l*) *Campbell v. Rothwell*, 47 L. J. Q. B. 144; 38 L. T. 33.

(*m*) *Mayhew v. Crickett*, 2 Swan. 185, 191.

taken by
creditor for
the debt.

pays off, not only the sum for the payment of which he became surety, but also such further sum as may have been advanced on the security of the same mortgage (a). This does not, however, appear to be the case, where the surety was wholly ignorant of the second advance, and such advance was not contemplated at the time of the original loan (b). Where, also, there is a special contract excluding the right to tack a subsequent debt, the creditor would not be allowed to retain the mortgage, as against the surety, until payment of such subsequent debt (c). In the case of *Farebrother v. Wodehouse* (d), it was decided, that where two properties are mortgaged by A. to B. for distinct sums, and C. is surety for one only, the right of B. to retain all the securities until repaid both debts overrides the right of C. to have the benefit of the securities for that debt for which he is surety. There the defendant lent A., at the same time, two sums of 2,000*l.* and 3,000*l.* on distinct securities, and the plaintiff was surety for the first sum. It was held that the plaintiff, on paying the 2,000*l.*, was not entitled to have a transfer of the securities held for that sum until the defendant had also been paid the 3,000*l.*

Farebrother
v. Wodehouse.

Forbes v.
Jackson.

This last-named case has been disapproved of in the case of *Forbes v. Jackson* (e), in which the facts were as follows:—In December, 1854, S. assigned certain premises and a policy of assurance to secure the repayment of a sum of 200*l.* advanced to him by W. and interest. The proviso for redemption was,

(a) *Williams v. Owen*, 13 Sim. 597; but see *In re Kirkwood's Estate*, 1 Ir. L. R. 108, where *Williams v. Owen*, *supra*, disapproved of.

(b) *Forbes v. Jackson*, 19 Ch. D. 615; 51 L. J. Ch. 690; 30 W. R. 252; *Newton v. Chorlton*, 10 Hare, 646; 2 Drew. 333; *contra Williams v. Owen*, 13 Sim. 597.

(c) *Bowker v. Bull*, 1 Sim. (N.S.) 29, where, however, *Williams v. Owen*, *supra*, was not cited.

(d) 23 Beav. 18, 28.

(e) 19 Ch. D. 615; 51 L. J. Ch. 690; 30 W. R. 252; and see *In re Kirkwood's Estate*, 1 Ir. L. R. 108.

that on payment of the money W. would re-assign the premises and policy unto S., his executors, administrators or assigns, or as he or they should direct. F., by the same indenture as surety, covenanted, for himself only, with W. that while the 200*l.*, or any part thereof, remained owing, he would pay the interest and premiums, and he also assigned a policy on his own life and covenanted to pay the premiums. W., at four different periods, between May, 1856, and May, 1866, advanced moneys amounting to 530*l.* to S., on security of the same premises. S. made default in payment of the interest. W. died in 1878, and his executors made a demand upon F. for all arrears, which he paid, and he also paid the premiums on the policy of S. It was held that F. was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December, 1854. Now it is to be noticed that in this case it was admitted that the subsequent advances were made without the surety's knowledge or consent. It is, therefore, submitted that this circumstance is quite sufficient of itself to support the judgment of *Hall*, V.-C., and that, consequently, his decision in no way conflicts with *Farebrother v. Wodehouse* (*f*), where, at the time the suretyship was entered into, the surety *knew* that the securities held by the creditor were intended to cover not only the sum guaranteed, but also another sum to which the promise of the surety did not extend. However, no such distinction was drawn by the learned Vice-Chancellor in his judgment, in which he states that his decision is founded on *Newton v. Chorlton* (*g*), and that he refuses to follow *Williams v. Owen* (*h*), though Lord *Romilly* followed it in *Farebrother v. Wodehouse*.

The case of *South v. Bloxam* (*i*), is also of much importance to sureties. There two funds were mort-

*South v.
Bloxam.*

(*f*) *Ubi supra*.

(*g*) 10 Hare, 646.

(*h*) 13 Sim. 597.

(*i*) 2 H. & M. 457.

gaged to A., with a covenant by a surety. A second mortgage of one of these funds was made to B. B.'s fund having been exhausted in part payment of A.'s debt, and A.'s mortgage having been transferred to the surety, on payment by him of the balance, it was held that B. had a right to marshall the securities as against the surety. It was also held that the surety could not tack, as against B., the costs of a defence to an action on his covenant from which B. derived no benefit, but that he might charge, as against B., all costs incurred for the common benefit of the persons interested in the estate after the first mortgage. *Seem*, also, that, as against the original mortgagor, the surety might have tacked to his security all costs not improperly incurred as surety. And in all cases, *as against the mortgagor*, a surety for a mortgagor who pays part of the mortgage is entitled to a charge on the estate (a). In an action for foreclosure one period only of six months for redemption will be allowed to the mortgagor and his surety for the payment of the mortgage debt, and not a period of six months to each in succession (b).

Formerly
surety not
entitled to
have bond
debt of
principal
debtor
assigned to
him on
payment.

There formerly existed a remarkable exception to the general right of the surety to have all securities held by the creditor made over to him on payment of the debt. This exception was founded upon highly technical reasons. For it was held that, where a surety paid off the *bond* debt of his principal, for which he was bound, he could not require the creditor to assign to him such bond debt, because it was satisfied and extinguished by the very act of payment by the

(a) *Gedye v. Matson*, 25 Beav. 310; and see *Allen v. De Lisle*, 3 Jur. (N.S.) 928. When husband and wife join in a mortgage of the latter's separate property for the former's benefit, the latter (*i.e.* the wife) is entitled to the same rights as any other surety: *Per* WICKENS, V.-C. in *Ferguson v. Gibson*, L. R. 14 Eq. 379, 385, 386; *Hudson v. Carmichael*, Kay, 613; *Partridge v. Porrett*, 2 Atk. 383; so in converse case, where the husband covenants to pay the wife's mortgage debt, he likewise has the rights of a surety: *Gray v. Dowman*, 27 L. J. Ch. 702.

(b) *Smith v. Olding*, 25 Ch. D. 462; 50 L. T. 357; 22 W. R. 386.

surety (c). And it was held, that even an assignment of the bond, executed to a trustee for the surety, at the time when the surety paid off the debt, would not keep alive the instrument so as to make the surety in equity a specialty creditor of the principal (d). The law of England has in this respect been altered by the 5th section of the Mercantile Law Amendment Act (e). The right conferred by 19 & 20 Vict. c. 97, s. 5.

This enacts that, “every person, who being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, *whether such judgment, specialty or other security, shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty*, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as

(c) *Copis v. Middleton*, 1 T. & R. 231; *Jones v. Davids*, 4 Russ. 277; *Armitage v. Baldwin*, 5 Beav. 278; *Dowbiggan v. Bourne*, 2 You. & Coll. 462; *Gammon v. Stone*, 1 Ves. sen. 339; *Robinson v. Wilson*, 2 Madd. 434; *Parsons v. Briddock*, 2 Vern. 608.

(d) *Jones v. Davids*, 4 Russ. 277.

(e) 19 & 20 Vict. c. 97.

between those parties themselves, such last-mentioned person shall be justly liable.”

Construction
of this
enactment.

This enactment has, in one or two instances, received judicial interpretation (*a*). Thus, it has been decided that the Act applies to contracts entered into *before* the passing of the Act, provided the breaches of them have taken place and payment has been made by the surety, *after* the passing of the Act (*b*). It has also been held that a surety is not entitled to have an assignment of the principal security, unless he pays the debt in full (*c*). And in the case of *In re Russell, Russell v. Shoolbred* (*d*), it was held that a right of distress for rent in arrear is not a security held by a creditor in respect of a debt within the meaning of the Act, and, therefore, that the act of the creditor, though it may have the effect of destroying such right, does not discharge the surety. The reasons for this decision were thus shortly expressed by the court:—“In the first place, the right of distress is not in common parlance, nor we think in legal phraseology, a security held for a debt, it is a particular remedy which arises on non-payment; in the second place, the section appears to be dealing with securities, which, according to the existing law, are in their nature assignable, which is not the case with a power of distress for rent in arrear, which, according to the common law, was only incidental to the immediate reversion; and, lastly, we think that the preamble is strong to show that the Legislature had no intention of effecting a great change in the law regulating the relations of landlord and tenant.”

In re Russell,
Russell v.
Shoolbred.

Mode of
compelling

As regards the mode of enforcing the surety's right

(*a*) See cases cited *post*, pp. 358, 361, with regard to co-sureties.

(*b*) *In re Cochran, De Wolf v. Lindsell*, L. R. 5 Eq. 209; 16 W. R. 324; 17 L. T. (N.S.) 487; 37 L. J. Ch. 293; following *Lockhart v. Reilly*, 1 De G. & J. 464; 27 L. J. Ch. 54; *Batchelor v. Lawrence*, 9 C. B. (N.S.) 543; 30 L. J. C. P. 39.

(*c*) *Ewart v. Latta*, 4 Macq. H. L. R. 983.

(*d*) 29 Ch. D. 254.

under 19 & 20 Vict. c. 97, s. 5, to an assignment of securities, it was held, in a case decided before the Judicature Acts, that advantage cannot be taken of the Act by *motion* (e), and that the only way, apparently, in which it can be made available is by *action* (f). Where a creditor recovered judgment against a principal debtor and his surety, which the latter satisfied, on the creditor refusing subsequently to assign such judgment, it was held, in an action by the surety against the creditor to enforce his right to the assignment, that the surety was *primâ facie* entitled to recover as damages the value of the specific assets which would have been available for execution under the judgment, if assigned, and that it was not incumbent on him in the first instance to show that there were no other assets available (g).

assignment
of securities
under 19 & 20
Vict. c. 97,
s. 5.

An exception to the rule which requires all securities held by a creditor for the debt guaranteed to be preserved for the benefit of the surety exists where, on the bankruptcy of the debtor, the creditor elects to surrender his security and prove for the whole debt (h). For it must be taken that where three persons enter into the relations of creditor, debtor and surety, the possible bankruptcy of the debtor is an event which the surety has in his contemplation at the time of entering into the contract of suretyship, and that consequently it becomes

Surety not
discharged
by creditor
surrendering
security on
debtor's
bankruptcy,
and electing
to prove
instead for
whole debt.

(e) *Phillips v. Dickson*, 8 C. B. (N.S.) 391. In *America*, it is discretionary whether to entertain a motion made by a surety to compel assignment or to oblige him to resort to an action to obtain the relief asked for : *Tyler v. Hildreth*, 84 New York S. C. R. 580.

(f) *Phillips v. Dickson*, *ubi supra*.

(g) *Oddy v. Hallett*, 1 C. & E. 532; and see *Tyler v. Hildreth*, *supra*.

(h) *Rainbow v. Juggins*, 5 Q. B. D. 138, 422. A person who holds a guarantee given to another to whom he has lent money is not a "secured creditor" within the meaning of s. 16 of the Bankruptcy Act, 1883, if such guarantee was given to the lender out and out to do what he likes with. Therefore such person can prove without surrendering his security : *In re Hallett & Co., Ex parte Cocks, Biddulph & Co.*, (1894) 2 Q. B. 256.

an *implied term* of that contract, that in the event of bankruptcy occurring, the creditor shall be entitled to exercise that option which the bankruptcy law gives him in the way which is most advantageous to himself (*a*).

Whether if surety does not insist on securities being given up he can long afterwards demand them from creditor who has made advances to debtor.

It is submitted that if the surety, on payment of the debt guaranteed, does not insist on the securities held for it by the creditor being given up, and a long time afterwards credit is given to the debtor on the same securities, the surety cannot compel the delivery of them to him. Certainly, as against the debtor the right of the creditor to hold such securities is absolute (*b*).

Surety is entitled to all the equities which creditor could have enforced.

Not only is a surety, who pays off his principal's debt, entitled to a transfer of securities held by the creditor, but he is also in all respects entitled to *all* the equities which the creditor could have enforced. And this right prevails, not merely against the original creditor of the principal debtor, but also against all persons claiming under the latter (*c*). A. mortgaged his estate to C., and B. became A.'s surety for the debt. Afterwards A. mortgaged the estate to D., who had notice of the first mortgage. The first mortgage was subsequently paid off, partly by B., the surety, but D. got a transfer of the legal estate. It was held that the surety had still priority over D. for the amount paid by him under the first mortgage, as surety for A. (*d*). Again, on a purchase of goods by a broker for an undisclosed principal, in a market according to the usage of which such a broker is personally liable in default of his principal, and is, therefore, a surety for the latter, the unpaid vendor's lien will pass to the broker, on default

(*a*) *Rainbow v. Juggins*, *ubi supra*.

(*b*) *Waugh v. Wren*, 11 W. R. 244.

(*c*) *Drew v. Lockett*, 32 Beav. 499; and see *In re Kirkwood's Estate*, 1 Ir. L. R. 108.

(*d*) *Ib*.

made by his principal, even though the latter may have pledged his interest in the goods to the third persons, and indorsed the delivery order to them (e).

A surety who has paid the principal's debt, also has a right, upon the *bankruptcy* of the principal debtor, to stand in the place of the creditor himself (f). This right only arises in a case where the surety has paid the *whole* of the debt (g). Where, however, the surety is surety for a *part* of the debt, as between the creditor and the principal debtor, the right in question arises merely by payment of the part, because that part, as between him and the creditor, is *the whole* (g).

Right of surety to stand in creditor's place on principal debtor's bankruptcy.

Thus a surety may compel the creditor, on the bankruptcy of the principal debtor, to prove against his estate for the amount due, and the creditor will be a trustee of the dividends for the surety who has paid the whole debt (h). If the dividends on the bankrupt's estate are not sufficient to pay the creditor, and the surety pays what remains due, he is entitled to stand in the creditor's place as to future dividends (i). Where a limited guarantee has been given, and the limit has been exceeded by the creditor, who afterwards receives from the estate of the principal debtor a dividend, the surety is entitled to the benefit of a part of that dividend, proportional on the amount guaranteed,

The creditor is a trustee of dividends for surety who has paid debt.

(e) *Imperial Bank v. London and St. Katherine's Dock Co.*, 5 Ch. D. 195; 46 L. J. Ch. 335; 36 L. T. 233.

(f) See *In re Sass, Ex parte National Provincial Bank of England*, (1896) 2 Q. B. 12; and see *Commercial Bank of Australia v. Official Assignee of the Estate of Wilson & Co.*, (1893) A. C. 181; *In re Blakeley, Ex parte Aachener Disconto Gesellschaft*, 9 Morrell, 173, 178.

(g) *Per* VAUGHAN WILLIAMS, J., in *In re Sass, Ex parte National Provincial Bank of England*, (1896) 2 Q. B. at p. 15; and see *Ex parte Rushforth*, 10 Ves. 409; *Gray v. Seckham*, L. R. 7 Ch. 680.

(h) *Ex parte Rushforth*, 10 Ves. 409, 414; *Beardmore v. Cruttenden*, 1 Cooke's B. L. p. 233, margin. And see *Jackson v. Magee*, 3 Q. B. 48; *Ex parte Turner*, 3 Ves. 243; *Paley v. Field*, 12 Ves. 435.

(i) *Ex parte Johnson*, 3 D. M. & G. 218.

notwithstanding that the unpaid debt greatly exceeds the amount of such guarantee (a). And if, in such a case, the creditor had recovered the whole sum guaranteed, in an action against the guarantor, the right of the latter to file a bill for an account and payment to him of such dividends, was not formerly barred by the fact that he might have pleaded a set-off to that extent in the action, and omitted to do so (b). Such a claim was held not to be a mere "money demand," within the meaning of the principle excluding actions for damages only (c). And where a creditor receives dividends upon a debt, partly secured by the guarantee of a third person, the dividends must not be appropriated to the excess of the debt above the sum guaranteed, but must be applied rateably to the whole debt, and the surety is relieved from liability by the amount of dividend on the part which is secured (d). But, if bills be discounted in the market which are drawn by one firm upon another firm, and then both these firms become bankrupt or agree to a composition, the bill-holder is entitled to prove against both estates and to receive *all* the dividends or composition he can get from *both* estates until he has received 20s. in the pound, and whether it may turn out that the drawer is surety for the acceptor or the acceptor is surety for the drawer, yet the surety has no right to receive anything until the bill-holder has received altogether 20s. in the pound (e). On the other hand, if the creditor accepts from the surety a composition of so much in the pound,

(a) *Thornton v. M'Kewan*, 1 H. & M. 525. See also *Hobson v. Bass*, L. R. 6 Ch. App. 792. *Aliter*, where there has been a waiver of such right by the surety, either impliedly, or by express agreement contained in the contract of suretyship itself, see *post*, p. 335.

(b) *Thornton v. M'Kewan*, *supra*.

(c) *Ib*.

(d) *Raikes v. Todd*, 8 Ad. & E. 846. But see *The Liverpool Borough Bank v. Logan*, 5 H. & N. 464.

(e) *Ex parte Turquand, In re Fothergill*, 3 Ch. D. 445, 450; 45 L. J. Bank. 153.

he can only prove against the estate of the principal debtor for the balance, after deducting part payment (*f*).

The right of the surety, under s. 173 of the Bankruptcy Act, 1849, was to prove, in the place of the creditor, or to have the benefit of the creditor's proof, and the sureties were bound by the election of the creditor who had elected to prove against a particular estate (*g*).

Rights formerly possessed by surety under s. 173 of B. A. 1849.

A surety paying, after the bankruptcy of the principal debtor, to a creditor who has proved, can only stand in the place of the creditor upon the bankrupt's estate, and, in case of a surplus, cannot claim interest unless the creditor could have claimed it (*h*). Where, however, the surety had improperly proved for interest, subsequent to the *fiat* in Bankruptcy, the Court of Chancery, sitting in bankruptcy, refused to reduce the proof after seven years had elapsed, and after the death of the surety (*i*).

The Bankruptcy Act of 1869 did not, it seems, contain any section equivalent to the 173rd section of the Bankruptcy Act, 1849, which enacted that "sureties and persons liable for the debts of a bankrupt may prove after having paid such debts" (*k*); nor do the Bankruptcy Act, 1883, and the rules framed under it, contain any provision as to proof by sureties (*k*).

Subsequent Bankruptcy Acts do not repeat this provision.

(*f*) *In re Oriental Commercial Bank, Ex parte Maxoudoff*, L. R. 6 Eq. 582. *Midland Banking Co. v. Chambers*, L. R. 4 Ch. App. 398. *In re Blackburne, Ex parte Strouts*, 9 Morrell 249, where VAUGHAN WILLIAMS, J., lays it down that the rule as to deducting from a proof the amount received from a third person applies only to bills and negotiable instruments, *sed quare In re Blakeley, Ex parte Aachener Disconto Gesellschaft*, 9 Morrell 173; *Ex parte Adams*, 3 Mont. & A. 157.

(*g*) *Ex parte Carne, In re Whitford*, L. R. 3 Ch. App. 463. See also *Ex parte Bevan*, 10 Ves. 107.

(*h*) *Ex parte Houston*, 2 G. & J. 36.

(*i*) *Ex parte Sanderson*, 8 D. M. & G. 849.

(*k*) Robson's Bankruptcy 7th ed. p. 305.

Which of several sureties entitled to benefit of creditor's proof.

Where there are several sureties, it sometimes becomes a question which of them is entitled to the benefit of the creditor's proof. A bond was entered into by a principal and three sureties. The principal and one of the sureties compounded with their creditors, and the other two sureties became bankrupt. The obligee proved the full amount of his debt against the separate estates of the two bankrupts, and claimed under the compositions, and by these means received 20s. in the pound; but the estate of the compounding surety paid more than its contributive share. It was held that that estate was entitled to the benefit of the proof made by the creditor against the bankrupt surety (a).

Rights possessed by surety for a company which is being wound up.

Akin to the rights possessed by a surety, on the bankruptcy of the debtor, are those devolving upon a person who has guaranteed the debt of a company which has afterwards been wound up (b). That is to say, where such a person has paid the debt for which he is surety, he is entitled to receive from the creditor a share of the dividend payable to the latter in the winding up, bearing the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the creditor (c). Moreover, the rule established by *Ex parte Turner* (d) that in similar cases in bankruptcy, the sum paid by the surety is, in calculating the proportions of dividend, to be considered as expunged, does not apply to cases in winding up (e). A surety who has not been called upon to pay anything under his

(a) *Ex parte Stokes and another*, De Gex 618; 12 Jur. 891; followed in *In re Parker, Morgan v. Hill*, (1894) 3 Ch. 400, C. A.

(b) The 10th section of the Judicature Act, 1875, introduces certain bankruptcy rules into the winding up of insolvent companies, namely, those relating to (1) the respective rights of secured and unsecured creditors, (2) the debts and liabilities provable, and (3) the valuation of annuities and future and contingent liabilities. Lindley on Companies, 5th ed. p. 719.

(c) See *Gray v. Seckham*, L. R. 7 Ch. App. 680; 26 L. T. 233; 27 L. T. 290.

(d) 3 Ves. 243.

(e) *Gray v. Seckham*, *ubi supra*.

guarantee for a company is not a creditor who can obtain a winding-up order (*f*).

The rights which the surety possesses of standing in the creditor's place, as regards all the latter's securities and equities, and on the bankruptcy of the principal, may, however, be waived. The waiver may be made by express agreement in the contract of suretyship (*g*). Thus it may be agreed between the surety and creditor that the receipt by the latter of dividends in the bankruptcy of the principal debtor shall not diminish the liability of the surety to pay in full (*h*). But it need not of necessity be express (*i*). Thus, for instance, in the case of *Cooper v. Jenkins* (*k*), A. was tenant for life of lots 1 and 2, to which B. was entitled in remainder. B., and A. as his surety, mortgaged lot 2,—B. alone covenanting to pay. By a contemporaneous deed, B. conveyed his interest in the other lot on trust to indemnify A. as his surety. A. paid large sums for interest on the mortgage. It was held that he was entitled to the benefit of the deed of indemnity only, but not to stand in the place of the mortgagee on lot 2. Sir *John Romilly*, M.R., said, "The plaintiff cannot have the benefit of the mortgage on the principle of the Mercantile Law Amendment Act. He must proceed under one or other of the two rights which he claims. If he had bound himself to pay the mortgagee and had done so, he would then have been entitled to the benefit

Surety may
waive his
rights.

(*f*) *Vron Colliery Co.*, 20 Ch. D. 442; *Law Courts Chambers Co.*, 61 L. T. 669.

(*g*) See *Ex parte Hope*, 3 M. D. & D. 720; *Midland Bank v. Chambers*, L. R. 4 Ch. App. 398; *Earle v. Oliver*, 2 Exch. 71; *In re Gillespie*, 19 Ir. L. R. 198.

(*h*) *In re Sass*, *Ex parte National Provincial Bank of England*, (1896) 2 Q. B. 12; *Ex parte Midland Banking Co.*, *Re Sellers*, 38 L. T. (N.S.) 395; *In re Blakeley*, *Ex parte Aachener Disconto Gesellschaft*, 9 Morrell 173; *Ex parte National Provincial Bank*, *In re Rees*, 17 Ch. D. 98; 44 L. T. 325; 27 W. R. 796; *Ex parte Miles*, De Gex 623.

(*i*) *Wagh v. Wren*, 11 W. R. 244.

(*k*) 32 Beav. 337.

of the mortgage. He has not done so; he has bargained by a separate instrument for an indemnity which is perfectly distinct. This payment of interest was perfectly voluntary, but that does not affect the deed of indemnity, which is precise and entitles him to what he has paid, whether he was compelled to pay or not. If a surety pay off the mortgage, he is entitled to the benefit of all the securities. But here the plaintiff has contracted with the mortgagor, for whom he is surety, that he should receive a particular species of indemnity if he pay off any part of the principal or interest. That indemnity he is entitled to, and not to the benefit of the mortgage paid off."

Where a surety who is liable for the whole or part of another's debt has paid the whole of what he is liable for, and has expressly waived in the contract of suretyship his right to stand in the place of the creditor to that extent against the estate of the bankrupt debtor (*a*), the circumstance of the surety having received from the principal debtor a counter-security, makes no difference in the respective rights of the parties. This was decided in the case of *The Midland Banking Company v. Chambers* (*b*). There, a bank permitted a customer to overdraw his account upon having a guarantee from a surety to the extent of 300*l.*, which guarantee provided that all dividends, compositions and payments received on account of the customer should be applied as payments in gross, and that the guarantee should apply to and secure any ultimate balance that should remain due to the bank. The customer gave the surety a mortgage on part of his estate by way of indemnity. Afterwards the customer compounded with his creditors by a deed which provided for the administration of the assets as in

(*a*) As to this right, see *ante*, p. 331, and see *The Midland Banking Co., Ex parte, In re Sellers*, 38 L. T. 395; *Ex parte Hope*, 3 M. D. & D. 720; *Midland Banking Co. v. Chambers*, L. R. 4 Ch. App. 398.

(*b*) L. R. 4 Ch. App. 398. See also *Ex parte Hope*, 3 M. D. & D. 720.

bankruptcy. His banking account was overdrawn 410*l.* The mortgage was realized, and the surety paid the bank the 300*l.* secured by it. It was held by the Lords Justices (affirming the decree of *Malins*, V.-C.), that the bank was not, as contended by the trustees of the composition deed, restricted to proof for the balance of 110*l.*, but was entitled to receive dividends on the whole 410*l.*, not receiving in the whole, including the 300*l.*, more than 20*s.* in the pound.

The right of the surety to reduce his liability, by deducting a rateable proportion of dividends paid under the bankruptcy of the principal debtor, may not only be wholly lost by reason of its express exclusion contained in some clause of the instrument of guarantee, but it is often a nice question of construction whether, having regard to the form of the guarantee, this right of the surety can be exercised, in cases where the debt guaranteed exceeds the sum to which the liability of the surety is expressly limited, until the whole of the debt has been liquidated. The determination of this question would appear to depend upon whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only (c). In the former case, the surety's right to stand in the place of the creditor remains in abeyance until satisfaction of the whole debt (d); while, in the latter case, his right can be exercised the moment the limit of his guarantee has been reached, and he has been obliged to make payments thereunder (e). To which class of guarantees a particular instrument belongs is determined by principles which have been explained on an earlier page of this work (f).

Right of surety to the benefit of dividends received on principal debtor's bankruptcy often a nice question of construction of instrument of guarantee.

(c) *Ellis v. Emmanuel*, 1 Ex. D. 157.

(d) *Ellis v. Emmanuel*, *ubi supra*; *Hobson v. Bass*, L. R. 6 Ch. App. 792; *Bardwell v. Lydall*, 7 Bing. 489; *In re Sass*, *Ex parte National Provincial Bank of England*, (1896) 2 Q. B. 12; 44 W. R. 558.

(e) See *Gray v. Seckham*, L. R. 7 Ch. App. 680.

(f) *Ante*, pp. 235, 236.

Previous course of dealing between parties does not indicate an intention by surety to abandon right of proof against principal debtor's estate. Rights of surety against co-sureties. To obtain contribution from his co-sureties. How this right arises.

It would seem that a course of dealing between the parties, previous to the bankruptcy of the principal debtor, will not give rise to the presumption that the surety has abandoned to the creditor his right of proof against the estate of the principal debtor (a).

III. *The rights of the Surety against the Co-surety.*

The rights of a surety against his co-sureties arise when he has been compelled to pay under the guarantee. And the principal rights which he then becomes entitled to are, the right of *contribution* from his co-sureties, (b) and the right to the benefit of any securities which they may possess.

The right of the creditor to contribution from his co-sureties arises thus.

It often happens that where there are more sureties than one for the *same* principal debtor, the creditor makes one surety pay the *whole* debt, or more than his just share or proportion of such debt. Whenever this occurs, the surety who has thus been made to pay has a right to recover from his co-sureties their respective shares of the sum which he has paid to the common creditor (c).

(a) *Ex parte Johnson*, 3 De G. M. & G. 218.

(b) Though there is no right of contribution amongst wrongdoers (*Merryweather v. Nixan*, 8 T. R. 186; *Shackell v. Rosier*, 3 Scott 59), the right is by no means confined to sureties, but extends to other joint contractors (see *Earl of Mountcashill v. Barber*, 14 C. B. 53), except where, though equally liable to the creditor, as between themselves, one only is to be liable (*Turner v. Davies*, 2 Esp. 478; *Done v. Walley*, 2 Exch. 198). The Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 5, provides that "every person, who by reason of his being a director, or named as a director, or as having agreed to become a director, or of his having authorized the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment."

(c) *Cowell v. Edwards*, 2 B. & P. 268; *Deering v. Winchelsea*, 2 B. & P. 270; *Kemp v. Finden*, 12 M. & W. 421; *Reynolds v. Wheeler*,

The Roman civil law never recognized the right of contribution among sureties (*fidejussores*) as it exists in England, and in most, if not all European states. This is the more remarkable, because the *lex Apuleia* (B.C. 102) provided that, in the case of *sponsores* and *fidepromissores* (*d*), if any one of them paid more than his share, he should have an action against the others for that which he had paid in excess. However, the *fidejussor* (surety), who was first sued by the creditor, though he had no remedy, in his own right, against his co-sureties, had what was termed the *beneficium cedendarum actionum*, which enabled him, before paying the creditor, to compel the latter to assign over to him all his rights of action against the principal debtor and the co-sureties (*e*). Moreover, a rescript of the Emperor Hadrian gave to the *fidejussor* (surety), against whom the creditor demanded payment in full, the *beneficium divisionis* (*f*), that is to say, the right of forcing the creditor to divide his demand amongst all those *fidejussores* (sureties) who were solvent at the time of the *litis contestatio* (*g*). Again, as already

Roman civil law did not recognize this right.

10 C. B. (N.S.) 561; 30 L. J. C. P. 350; *Morgan v. Seymour*, 1 Ch. Reps. 64; *Davies v. Humphries*, 6 M. & W. 153, 167; *Ex parte Snowdon*, *In re Snowdon*, 17 Ch. D. 44; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654; *Batard v. Hawes*, 2 E. & B. 287; *Brown v. Lee*, 6 B. & C. 697; *Ex parte Gifford*, 6 Ves. 805; *Dunn v. Slee*, 1 Moore 2; *Turner v. Davies*, 2 Esp. 479; *Craythorne v. Swinburne*, 14 Ves. 164; and see *Macdonald v. Whitfield*, 8 App. Cas. 733.

(*d*) *Sponsores* and *fidepromissores* differed in some particulars from *fidejussores* (sureties). Thus the former could not be attached to any but verbal obligations, whereas the latter could be attached to any obligation, whether contracted *re*, *verbis*, *litteris*, or *consensu*. Again, while the obligation of the *fidejussor* bound the heir, that of the *sponsor* and *fidepromissor* did not do so. So, too, the latter were freed from liability after two years by the *lex Furia*, while the former was bound in perpetuity. See, further, the Commentaries of Gaius, by Abdy and Walker, Book iii., 115, 126.

(*e*) Dig. xlv. 1, 17. See also Mackeldeii *Systema Juris Romani*, s. 438.

(*f*) Inst. 3, 20, par. 4.

(*g*) The ceremony by which litigants submitted the matter in dispute between them to the decision of the judge.

pointed out (a), the creditor might have been compelled by the sureties to sue the principal debtor before having recourse to any of them. It cannot, therefore, be considered that the Roman civil law was harsh in its treatment of sureties.

From what date right of contribution recognized in England and by chancery courts.

In *England*, the right of contribution among sureties appears to have been recognized by the courts of chancery, at all events from the time of Elizabeth, though there seems to be no reported instance of contribution between sureties before the 17th century (b). According to Lord *Eldon* (c), it existed in equity from the very earliest times. The courts of common law, however, did not anciently enforce contribution among sureties, and, in *Offley and Johnson's Case* (d), it was held, that, at *common law*, one surety has no right to contribution from a co-surety. It seems, however, that the right of contribution has always existed by the custom of London (e), and all the courts of common law eventually assumed jurisdiction in cases of contribution; but the courts of equity did not on that account abdicate their *original* jurisdiction (f). And even when courts of law and equity alike recognized the right of contribution amongst sureties, yet the jurisdiction in equity was, before the Judicature Acts, both more *convenient* and more *extensive* than that of the courts of common law. It was more *convenient*, because, where the sureties were numerous, and bound by separate instruments, by a single suit in equity, to which all the sureties were

Courts of common law eventually enforced contribution

But jurisdiction in equity was more convenient and extensive.

(a) *Ante*, pp. 318 *et seq.*

(b) *Per* WRIGHT, J. in *Wolmershausen v. Gullick*, (1893) 2 Ch. at p. 520.

(c) *Underhill v. Horwood*, 10 Ves. 208.

(d) 2 Leon. 166. See also observations of BULLER, J. in *Toussaint v. Martinant*, 2 T. R. 100, 105; and of TINDAL, C.J. in *Edger v. Knapp*, 6 Scott N. R. 707, 713.

(e) *Layer v. Nelson*, 1 Vern. 456; *Offley and Johnson's case*, *supra*; and see *per* WRIGHT, J. in *Wolmershausen v. Gullick*, (1893) 2 Ch. at p. 520.

(f) *Wright v. Hunter*, 5 Ves. 792.

made defendants, it was possible to achieve that which, at common law, could only be attained by bringing separate actions against the different sureties for their respective contributions. It was more *extensive*, because, at common law, the proportion of the debt which each surety was liable to contribute, was always regulated by the number of sureties originally liable, including any that were insolvent (*g*). But, in equity, the proportion of each surety's contribution was regulated by the number of solvent sureties (*h*).

These distinctions between law and equity, which formerly prevailed, are no longer of any practical importance, it having been provided by the Judicature Act, 1873, that where there is any conflict or variance between the rules of equity and those of the common law, with reference to the same matter, the rules of equity shall prevail (*i*). Moreover, in cases where no rule of practice is laid down by the new orders, and there is a variance in the old practice of the chancery and common law courts, that practice is to prevail which is considered by the court to be most convenient (*k*).

Former distinctions between law and equity in regard to contribution abrogated by Judicature Act.

The doctrine of contribution, as has been remarked before, originally was only a doctrine of the courts of equity, and, as an equitable doctrine, it is not founded *in contract*, but is the result of *general equity*, on the ground of equality of burden and benefit (*l*). This independent equity seems to arise from the co-sureties

Foundation of doctrine of contribution.

(*g*) See *Brown v. Lee*, 6 B. & C. 699; *Cowell v. Edwards*, 2 B. & P. 265; *Dallas v. Walls*, 29 L. T. 599; *Batard v. Hawes*, 2 E. & B. 287, 291.

(*h*) See *Lowe v. Dixon*, 16 Q. B. D. 455, 458; and see *post* p. 348.

(*i*) 36 & 37 Vict. c. 66, s. 25 (11); *Lowe v. Dixon*, *supra*.

(*k*) *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. D. 310.

(*l*) *Deering v. Winchelsea*, 2 B. & P. 270. Per Lord REDESDALE, in *Stirling v. Forrister*, 3 Bligh, 575, 590; *Craythorne v. Swinburne*, 14 Ves. 164; *Fletcher v. Grover*, 11 New Hamp. 368; and see *Per PEARSON, J. in Ramskill v. Edwards*, 31 Ch. D. at p. 110.

towards each other, *at the inception of the contract*, so that, each of them being supposed to be equally benefited by the credit given to the principal debtor, is bound to bear an equal share of the burden which is the consideration for such credit.

It is an equitable right.

The courts of law, however, having borrowed the equitable doctrine as to enforcing contribution amongst sureties, professed to give relief on the ground of implied *assumpsit*. That is to say, the *legal* right to contribution may be said to rest either (1) upon an implication of the assignment by the creditor, to the surety who *has* paid, of the rights of the creditor against the surety who has *not* paid, or (2) upon an obligation implied from the fact of the surety having paid money which the co-surety could have been compelled to pay. The real principle, however, on which the right depends appears to be that it is an equitable right. It has long been settled, said Lord *Eldon*, in *Craythorne v. Swinburne* (a), "That if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, *or any part of it*, the surety has a right in this court, either upon a principle of equity or upon contract, to call upon his co-surety for contribution, and I think that right is properly enough stated, as depending rather upon a principle of equity than upon contract, unless in the sense that the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground of implied *assumpsit*, that in modern times courts of law have assumed a jurisdiction upon this subject,—a jurisdiction convenient enough in a case simple and uncomplicated, but attended with great difficulty where the sureties are numerous, especially since it has been held, that separate actions may be

(a) 14 Ves. 164; and see also *Macdonald v. Whitfield*, 8 App. Cas. 733; *Stirling v. Forrister*, 3 Bli. 575, 590, 596.

brought against the different sureties for their respective proportions.”

The existence of the right of contribution being thus clearly established, and the principle on which it rests pointed out, it next remains to consider *when* such right arises. It may arise either (1) *after* payment has been made by a surety; or (2) *before* payment.

First, then, as regards the right to contribution *after* payment, which is the ordinary case. We have already seen (b) that the surety is entitled to sue the principal debtor for money paid to his use the moment he has paid *anything* in ease of the principal debtor. But the right of one surety to sue the other for contribution does not arise until the former has paid *more than his proportion or share of the common debt*, i.e., *more than he can ever be called upon to pay*; for, till then, it is not clear that he ever will be entitled to demand anything from his co-sureties, and, until he has a right to make this demand, he has no equity to receive a contribution, and consequently, no right of action, since the right of action is founded on the equity to receive it (c). The co-surety cannot know what is the debt due to him by his co-surety until he knows what has been done in respect of the residue of the debt for which he is equally liable (d). Moreover, the fact that the co-surety, against whom contribution is demanded, has not been required by the creditor to pay anything, makes no difference if he has not been released by the creditor (e). The practical advantage of this rule is considerable, as it would tend

When the right of contribution arises.

(1) After payment.

As soon as surety has paid more than his share of common debt.

(b) *Ante*, p. 305 *et seq.*

(c) *Ex parte Gifford*, 4 Ves. 805; *Davies v. Humphries*, 6 M. & W. 153, where a dubious expression in *Craythorne v. Swinburne*, 14 Ves. 164, is explained; and see *Ex parte Snowden*, *In re Snowden*, 17 Ch. D. 44; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654; *Leaver v. Pearce*, W. N. (1888) p. 105.

(d) *Ex parte Snowden*, *In re Snowden*, 17 Ch. D. 44, 47; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654.

(e) *Ib.*

to multiplicity of actions and great inconvenience if each surety might sue all the others for a rateable proportion of what he had paid, the instant he had paid any part of the debt (a). Where, however, a debt guaranteed is payable by instalments, a surety who has paid the whole of one instalment is, *semble*, entitled to recover contribution from his co-surety in respect of such payment (b). Until a surety has paid more than his share of the common debt he has no legal or equitable debt to sustain bankruptcy proceedings against his co-surety (c).

(2) Before payment. Surety may by action compel co-sureties to contribute towards payment of the debt to the creditor.

Secondly, as to the right to contribution *before* payment. This right is not often invoked, and there is very little authority to show the precise extent of the relief to which a surety may be entitled before payment (d). In nearly every reported case, the surety had, before action, paid more than his share; and nearly every case and text book refers to his right to contribution as the right of a surety who has paid more than his proportion, though, in a few cases, the ambiguous expression is used "when he is *called upon* to pay more than his proportion" (d). There is, however, now no doubt that the right exists, and that when a surety is called upon to pay a part of the whole debt for which he is liable he may, before payment, bring a action against his co-sureties to compel them to contribute with him to pay the debt due to the creditor, just as he would be entitled to call on them for

(a) *Per* PARKE, B. in *Daries v. Humphries*, 6 M. & W. 153.

(b) *In re Macdonald, Ex parte Grant*, W. N. (1888) p. 130; *Lawson v. Wright*, 1 Cox 275. Where co-sureties were liable on a promissory note for 5,000*l.*, "with interest at 5 per cent." and one of them paid the interest on this sum for one year, it was held that he was not entitled to contribution in respect of such payment from his co-surety, the principal remaining unpaid: *Lever v. Pearce*, *supra*.

(c) *Ex parte Snowden, In re Snowden*, 17 Ch. D. 44.

(d) *Per* WRIGHT, J., in *Wolmershausen v. Gullick*, (1893) 2 Ch. at p. 520.

contribution if he had been sued by the creditor, asking that he should be indemnified by his co-sureties against paying the whole debt or whatever risk he ran (*e*). On this subject reference must be made to the very recent case of *Wolmershausen v. Gullick* (*f*), which has established the right to contribution *before* payment. It was there held that a surety against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose, the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment; and where the principal creditor is a party to the action, the surety may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, he may obtain a prospective order directing the co-surety, upon payment by the surety of his own share, to indemnify him against further liability.

A payment made by a surety on the default of the principal debtor cannot, under any circumstances, be regarded as a payment made *voluntarily* (*g*); though a surety has no right to sue his co-surety for contribution

Payment made by surety of common debt is not a voluntary payment.

(*e*) *Per* JAMES, L.J., in *Ex parte Snowden, In re Snowden*, 17 Ch. D. at p. 47; and see *Macdonald v. Whitfield*, 8 App. Cas. 733, 750, where Lord WATSON, *pro cur.*, declared the right to contribution of a surety who had not [paid, but had had judgment against him in this form "Entitled and liable to equal contribution, *inter se*." Lindley on Partnership, 5th ed. 374.

(*f*) (1893) 2 Ch. 514. The learned judgment of WRIGHT, J., in this case traces the right of contribution amongst sureties from the earliest reports down to the present time. The decision of WRIGHT, J., derives strong support from the *dictum* of JAMES, L.J., in *Ex parte Snowden*, 17 Ch. D. 44; 50 L. J. Ch. 540; 29 W. R. 654. There appears, however, on comparing the different reports of this case, to be some doubt as to what the L.J. did really say.

(*g*) *Pitt v. Purssord*, 8 M. & W. 538.

unless the sum paid by him, and in respect of which he sues, is his *own* money (*a*). Therefore, to entitle the surety to sue the co-sureties for contribution, he need not show that he abstained from paying the creditor until compelled or requested by the latter to do so (*b*).

Contribution may be recovered without proving insolvency of principal debtor or of other co-sureties. Persons by and against whom contribution may be enforced.

It seems that one of several co-sureties may recover contribution from the others in an action without proving the insolvency of the principal and the other sureties (*c*).

The persons by and against whom the right to contribution—assuming it to exist—may be enforced, must next be considered. Now, as to this, it is well settled that a surety is entitled to enforce contribution, whether he knew or not at the time he became surety that he was co-surety with others (*d*) ; for, though one person becomes a surety without the knowledge of the others, the right of and liability to contribution exists (*e*). Thus, in *Whiting v. Burke* (*f*), the following were the facts :—A bond was executed by a principal debtor and two sureties, which provided that the sureties should not be discharged by any new arrangement between the creditor and the principal. One of the sureties compounded with his creditors, and by the terms of the bond the moneys secured became immediately payable. After this the plaintiff, at the request of the principal debtor and in consideration of forbearance on the part of the creditor, signed a separate undertaking whereby he agreed, but without

(*a*) *Geopel v. Swindon*, 1 D. & L. 888 ; 13 L. J. Q. B. 113.

(*b*) *Pitt v. Purssord*, *ubi supra*. It was recently held in *America* that judgment against one surety is not evidence of the failure of the principal debtor to perform the condition of his bond in an action for contribution against a co-surety : *Clark v. Norman*, 75 New York S. C. R. 372.

(*c*) *Cowell v. Edwards*, 2 B. & P. 268 ; and see *Lawson v. Wright*, 1 Cox Ch. Cas. 275.

(*d*) *Craythorne v. Swinburne*, 14 Ves. 160, 163 ; *Whiting v. Burke*, L. R. 10 Eq. 539 ; L. R. 6 Ch. App. 342.

(*e*) *Craythorne v. Swinburne*, 14 Ves. at p. 165.

(*f*) *Ubi supra*.

the knowledge of the solvent surety, to become an additional surety for the whole amount, and, upon the principal becoming insolvent, the creditor sued the plaintiff and obtained payment of the amount due. The plaintiff sought to enforce contribution against the solvent surety in the original bond, and it was held that he was entitled to such contribution.

The right of contribution also exists whether the sureties be bound jointly, or jointly and severally (*g*). It exists also among sureties for the *same* principal and the *same* engagement, whether they are bound by the *same* instrument or by *different* instruments (*h*). However, where sureties are bound by *different* instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them (*i*).

Right of contribution where the sureties bound jointly, or jointly and severally.

So, again, if it be arranged by contract (which it may be) that each surety shall be answerable only for a *given portion* of one sum of money, in such case there is no right of contribution among the co-sureties (*k*).

No contribution where each surety bound for a given portion of one sum.

It may be mentioned incidentally in this place that a director of a company, who has assented to and been party to a breach of trust, cannot obtain contribution from his co-director who did not assent to it (*l*). But a director who strongly protests against a particular loan being granted, and afterwards signs a cheque for the amount thereof, must be taken to have adopted it,

Nor against person who, though equally liable with plaintiff to creditor, for plaintiff's breach of trust, did not concur therein.

(*g*) *Per* Lord ELDON, in *Underhill v. Horwood*, 10 Ves. 208.

(*h*) *Mayhew v. Crickett*, 2 Swanst. 185; *Craythorne v. Swinburne*, 14 Ves. 160, 169, 170; *Pendlebury v. Walker*, 4 Y. & C. 424; *Swain v. Wall*, 1 Ch. R. 80; *Dallas v. Walls*, 29 L. T. R. 599.

(*i*) *Coope v. Twyman*, 1 T. & Russ. 426.

(*k*) *Pendlebury v. Walker*, 4 Y. & C. 424. *Aliter*, where several persons are sureties for one sum of money, though by distinct instruments, and one pays more than an equal share of that sum. *Ib.*; and see *post*, p. 351.

(*l*) *Ramskill v. Edwards*, 31 Ch. D. 100.

and if such loan is *ultra vires* he is responsible to his company for the amount, and is also liable to pay contribution to a co-director from whom the company may have recovered the amount of such loan (*a*).

Former distinctions between law and equity as to right of contribution where one of several co-sureties dies.

In case of the death of one of several co-sureties, a surety, who had been compelled to pay the whole debt, could always have recovered *in equity* the proportionate amount payable by the deceased solvent surety from his representative (*b*). Moreover, though the liability at law of a co-surety to one who had paid the entire debt was to contribute an aliquot part, according to the number of persons *originally* liable, without reference to the number liable at law at the time of payment (*c*), it would seem that an action at law might also have been maintained for contribution against the representative of a deceased solvent surety (*d*). Any distinctions that formerly existed on this subject between law and equity have now been swept away by the Judicature Act, 1873, which, as already stated, provides that where there is any conflict and variance between the rules of law and equity with reference to the same matter, the rules of equity shall prevail (*e*).

Right of contribution can only be enforced against persons who really are co-sureties.

The right of a surety to call for contribution can, however, only be enforced against persons who are strictly and really co-sureties with him (*f*). It does not exist against a surety for a surety. Such a person cannot be called upon to contribute. This was decided in *Craythorne v. Swinburne* (*g*). There A. and B.

(*a*) *Ramskill v. Edwards*, 31 Ch. D. 100.

(*b*) *Primrose v. Bromley*, 1 Atk. 89; *Simpson v. Vaughan*, 2 Atk. 31; and see *Ramskill v. Edwards*, *supra*.

(*c*) *Batard v. Hawes*, 2 E. & B. 287.

(*d*) *Batard v. Hawes*, *supra*; *Primrose v. Bromley*, *supra*; *Prior v. Hembrow*, 8 M. & W. 873.

(*e*) 36 & 37 Vict. c. 66, s. 25 (11), and see Supreme Court Rules, 1883, Ord. XVI.; *Ramskill v. Edwards*, *supra*; *Lowe v. Dixon*, 16 Q. B. D. 455, 458.

(*f*) See *Lacey v. Hill*; *Leney v. Hill*, 8 Ch. App. 441.

(*g*) 14 Ves. 160. See also *per* Lord PLUNKET in *Hartley v. O'Flaherty*, L. & G. (Ir. Ch.) 208, 217.

became sureties for C. and D. E., without the privity of A. and B., gave a distinct collateral security, limited to *default of payment by the principal and the other surety*. It was held that E. was not a co-surety, and therefore could not be made to contribute. In fact, E. was not liable in the *second* instance at all, but only in the *third* instance. Therefore E. could not be affected by the doctrine of contribution among sureties, which only arises where sureties are *equally* liable to the creditor.

Surety for a surety not liable to contribute.

A person who becomes surety for a third person jointly with another surety, and at the latter's request, cannot be compelled by the latter to contribute (*h*).

Person becoming surety at co-surety's request not liable to contribute.

Where a defendant signed a guarantee upon a condition, orally agreed to, that M. should also sign as a co-surety, and M. did not sign, and subsequently, and without notice of that condition, the guarantee was signed by the plaintiff, who, having been obliged, upon the default of the principal debtor, to pay the whole debt, sought to recover contribution from the defendant, it was held by the Court of Appeal in *Ireland* (reversing the decision of the Common Pleas) that the non-performance of the condition was a good defence to the action (*i*).

Nor person becoming surety on condition of another signing as co-surety, which condition has not been fulfilled.

The mode of enforcing the right of contribution by co-sureties is either by action or (should a co-surety unfortunately have become bankrupt) by proceedings in bankruptcy against him. Particulars of demand will be required from a surety claiming payment of a definite sum by way of contribution from a co-surety, and not merely asking for an account (*k*).

How right of contribution enforced.

In addition to the remedy afforded by means of an action against a co-surety for the recovery of contribution, a surety against whom an action has been from

Defendant can claim contribution from

(*h*) *Turner v. Davies*, 2 Esp. 479.

(*i*) *Barry v. Maroney*, 8 Ir. C. L. R. 554.

(*k*) *Blackie v. Osmaston*, 28 Ch. D. (C. A.) 119.

co-surety by
means of
third party
notice under
Judicature
Rules.

brought upon his guarantee may assert his right to contribution in the mode indicated by Order XVI. of the Judicature Rules. Rule 48 of this Order provides that a defendant claiming contribution or indemnity over against any other person not a party to the action, may obtain leave from a judge to give notice to such other person, who, if desirous of disputing the plaintiff's claim, may appear as a party to the action (*a*). Moreover, by a subsequent rule (55) of the same Order, this procedure is made to apply between co-defendants, one of whom claims contribution or indemnity against the other (*b*). Should the party upon whom the notice is served elect not to appear, he shall be deemed to admit the validity of the judgment obtained against the defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice (*c*). In giving leave to a defendant to serve notice of claim for contribution or indemnity on a third party, the court will not consider whether the claim is a valid one, but only whether the claim is *bonâ fide*, and whether, if established, it will result in contribution or indemnity (*d*). A co-surety, who is made a third party by a defendant surety, should not appear

(*a*) For form of third-party notice by a surety claiming contribution against a co-surety, see App. B., Form No. 1 of Judicature Rules. A third party cannot file a counter-claim against the original plaintiff (*Eden v. Weardale Iron & Coal Co.*, 28 Ch. D. (C. A.) 333), though he can do so against the defendant: *Borough v. James*, W. N. (1884) p. 32. The question whether there is a case for contribution or indemnity should be raised on the application for directions and not by application to the court or judge to set aside the third-party notice: *Baxter v. France*, (1895) 1 Q. B. 455, C. A. To entitle a defendant to proceed under Ord. XVI. r. 48, the right of the defendant to recover must not be an independent right, but one dependent on the liability of the defendant in the action: *Wynne v. Tempest*, W. N. (1896) 176.

(*b*) See *English & Scottish Trust Co. v. Flatau*, 36 W. R. 238, where this rule applied in a principal and surety case.

(*c*) S. C. R. Ord. XVI. r. 49.

(*d*) *Carshore v. North Eastern Rail. Co.*, 29 Ch. D. 344, C. A.

separately and by different counsel when he has no reason to suppose that the defendant will not fight the action to the uttermost (e). Where a defendant to an action on a guarantee served his co-surety B. with a third-party notice, who appeared, delivered defence, and retained separate counsel at the trial, it was held, on the defendant getting judgment in the action, that B. must bear his own costs, for the question between the defendant and B. was identical, and there was no reason to suppose that defendant would not fight the case properly (e).

Where a husband was surety for his wife under a mortgage, and on being made defendant sought to bring her in as a third party, it was held that, as she had no separate estate, this could not be done (f).

A married woman cannot, until she has separate estate, be made a third party by her surety. What can be recovered by way of contribution.

In the next place, it is important to consider *what* the surety seeking contribution can recover from his co-sureties. As a general rule, sureties contribute equally (g). The rule on the subject was thus expressed by Alderson, B., in *Pendlebury v. Walker* (h):—"Where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law supersedes that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute *equally, if each is a surety to an equal amount*, and, if not equally, then proportionately to the amount for which each is a surety." Thus where two or more persons join as sureties for a common principal, but bind themselves in different amounts, in

(e) *Williams v. Buchanan*, *Alexander*, third party, 7 Times L. R. 226.

(f) *Jones v. Elderton*, W. N. (1884) 39. This case, though decided before the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), would appear to be still law, as the Act in question does not render a woman liable *until* she has separate estate, though it is now immaterial *when* she became entitled thereto.

(g) *Deering v. Earl of Winchelsea*, 1 Cox 318; *Steel v. Dixon*, 17 Ch. D. 825.

(h) 4 Y. & C. at p. 441.

the event of the principal being in default, they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities, and not in equal amounts (a). So where sureties are bound by *separate* deeds and for *unequal* sums, no one can be called upon to contribute beyond the sum to which he is liable under his own deed (b). It is, however, not always easy to determine in what proportions the common liability shall be borne (c).

Costs of
action
defended by
surety
cannot,
as a rule, be
recovered.

As a general rule, a surety who defends an action brought for money deficient in the accounts of his principal cannot claim contribution from his co-sureties, for the costs of the action, unless he was authorized by them to defend (d). But where the plaintiff and defendant had executed, as sureties, a warrant of attorney, given as a collateral security for a sum of money advanced on mortgage to the principals, and, on default being made by the principals, judgment was entered up on the warrant of attorney and execution issued against the plaintiff, it was held, that he was entitled to recover from the defendant as his co-surety a moiety of the costs of such execution (e).

Surety
claiming
contribution

Another general rule is this: In his claim for contribution from his co-sureties the surety must allow for

(a) *Ellesmere Brewery Co. v. Cooper*, (1896) 2 Q. B. 75, and see *In re M'Donaghs*, 10 Ir. Rep. Eq. 269.

(b) See *Craythorne v. Swinburne*, 14 Ves. 160; *Deering v. Winchelsea*, 2 B. & P. 270.

(c) See *In re Sir J. J. Ennis, Coles v. Peyton*, (1893) 3 Ch. 242, C. A., where court had to determine amount of contribution where one of two sureties to a bond, by which principal debtor was also bound, died, and in pursuance of clause therein, a *fresh* bond, with addition of another surety in lieu of deceased one, was given. Held by C. A. that the liability was divisible in thirds.

(d) *Knight v. Hughes*, Mood. & Malk. N. P. C. R. 247; 3 C. & P. 467. See also *Roach v. Thompson*, Mood. & Malk. N. P. C. R. 487; and *Gillett v. Rippon*, Mood. & Malk. N. P. C. R. 406.

(e) *Kemp v. Finden*, 12 M. & W. 421.

all that he may have received either from the principal debtor or by a counter-security (*f*).

As already mentioned (*g*), in equity the amount of contribution was regulated by the number of *solvent* sureties, though at law a different rule prevailed (*h*). An early case upon this point is that of *Peter v. Rich* (*i*); there the plaintiff, the defendant and a third person were joint sureties for the payment of purchase-money to Lord *Russell*; the plaintiff and the defendant had each paid their proportionate share, but the third surety being insolvent, the plaintiff paid his share in addition. It was ordered by the court of equity, that such payment ought to be equally paid and borne by the plaintiff and defendant. So, also, in *Hitchman v. Stewart* (*k*), it was decided, that when one of several has paid the principal debt, and some of the co-sureties are insolvent, he is entitled in equity, as against the solvent sureties, to be repaid their numerical shares of what he has paid, with interest (*l*) from the time of

must give credit for sums received by him.

In equity amount recoverable by way of contribution was always regulated by number of solvent sureties.

(*f*) *Knight v. Hughes*, Moo. & Malk. N. P. C. R. 247; 3 C. & P. 467; *Steel v. Dixon*, 17 Ch. D. 825; 50 L. J. Ch. 591; 45 L. T. 142; 29 W. R. 735; *In re Arcedeckne*, *Atkins v. Arcedeckne*, 24 Ch. D. 709; 53 L. J. Ch. 102; 48 L. T. 725; and see *Ellesmere Brewery Co. v. Cooper and others*, (1896) 1 Q. B. 75.

(*g*) *Ante*, p. 348.

(*h*) *Ib.*; and see *per LOPES, J.* in *Lowe v. Dixon*, 16 Q. B. D. at p. 458.

(*i*) 1 Ch. Reps. 19. But see *Swain v. Wall*, 1 Ch. Reps. 81; Com. Dig. Chancery, 4 D. 6, contradicting this; and for observations upon last-named case, see Fell's Law of Mercantile Guarantees, 2nd ed. p. 212. See also, further, *Hole v. Harrison*, 1 Cas. in Ch. 246; and *Mayor of Berwick-upon-Tweed v. Murray*, 7 De G. M. & G. 497.

(*k*) 3 Drew. 271; and see *Ex parte Bishop*, *In re Fox, Walker & Co.*, 15 Ch. D. 400; *Dallas v. Walls*, 29 L. T. R. 599.

(*l*) It was formerly held in equity that a surety could not claim interest on the money paid by him, or on any part thereof (see *Onge v. Truelock*, 2 Molloy 31, 44; *Salkeld v. Abbott*, Hayes & Jones, 110; *Bell v. Free*, 1 Swanst. 90), but there is no doubt now that it is recoverable. See *Swain v. Wall*, 1 Ch. Rep. 81; *Lawson v. Wright*, 1 Cox, Ch. Cas. 275, 277; *Petre v. Duncombe*, 15 Jur. 86; 20 L. J. (N.S.) (Q. B.), 221; *In re Swan's Estate*, 4 Ir. Rep. Eq. 209, where it was held that where one

payment, although the instrument does not contain any express indemnity so as to carry interest as on a specialty. And it was there further held, that the insolvent sureties must pay their own costs of being brought before the court to the final hearing of the cause. "It appears to me," said Vice-Chancellor *Kindersley*, in this case, "that it is just, that when several persons concur in being sureties for a principal debtor, whatever view a court of law may take, on which I give no opinion, a court of equity will take this view, that there is among them all an implied agreement to indemnify each other; each agrees that, as among them, he will bear his aliquot part of the debt, and on that principle it is, I think, that *Lawson v. Wright* (a) must have been decided; finding that decision and finding it founded on what I think a sound equity, and no decision against it, I cannot do better than to follow it." This equitable rule is of course now followed in *all* courts, in accordance with the Judicature Act, 1873, s. 25, which provides that where there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail (b).

This equitable rule is now of universal application.

Who should be made parties to action for contribution.

In an action by a surety for contribution the principal and co-sureties, or their personal representatives, should, although they may have become *insolvent*, be made parties; unless the fact of their insolvency is clearly proved or admitted, and even in that case, it seems that the plaintiff has his election whether he will not bring the insolvent co-obligor or his representative before the court (c).

of two sureties had paid the full amount of a receiver's recognizance, he was entitled to use the same for the purpose of recovering out of the estate of his co-surety not only half of the sum so paid by him, but also *interest* thereon from the date of payment.

(a) 1 Cox, Ch. Cas. 275.

(b) *Lowe v. Dixon*, 16 Q. B. D. 455, 458.

(c) *Daniell's Chanc. Prac.* 6th ed., Vol. I., p. 252.

Should one of the co-sureties have become bankrupt, the surety requiring contribution will have to seek it not at common law, or in equity, but in bankruptcy. And it therefore is of importance to see what his rights, in such a case, will be.

As has already been stated (*d*), the right to contribution does not generally arise at all, and never after payment in respect of sums paid by a surety until a surety has paid *more* than his share of the common debt. Accordingly, it has been held that a surety who has only paid his proportion of the common debt has no debt capable of supporting a petition in bankruptcy against his co-surety (*e*). For, "until the whole debt has been paid by one surety, or so much of it as to make it clear that, as between himself and his co-sureties, he has paid all that he ever can be called upon to pay, there can be no equitable debt from them to him in respect of it. There is nothing ascertained as a debt which would give him a right to proceed against his co-sureties" (*f*).

If the amount has been paid *before* bankruptcy, the surety always could, and still may, prove for it in the usual way.

A surety, however, who was compelled to pay the debt of the principal debtor *after* the bankruptcy of a co-surety, could not prove under the 52nd section of 6 Geo. 4, c. 16, which provided that sureties and persons liable for the debts of bankrupts might prove after having paid such debts as therein mentioned. In *Wallis v. Swinburne* (*g*), which is a decision upon this enactment, *Parke, B.*, in giving judgment, observed,

(*d*) *Ante*, p. 343.

(*e*) *Ex parte Snowdon, In re Snowdon*, 17 Ch. D. 44; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654. See *per* WRIGHT, J. in *Wolmershausen v. Gullick*, (1893) 2 Ch. at p. 526, 527, where this case referred to, and dictum of JAMES, L.J., in *Ex parte Snowdon, supra*, is commented on.

(*f*) *Ib.*, *per* JAMES, L.J.

(*g*) 1 Exch. 203.

that it had been properly admitted by the counsel for the defendant (the bankrupt co-surety), that the plaintiff was not a surety for the debt of the bankrupt, but that it had been contended that, though not a surety, he was a *person liable* for the bankrupt's debt by reason of the instrument (a promissory note), on which he as well as the bankrupt was indebted to the creditors, having become due before the bankruptcy. After reviewing the various authorities, he went on to say that no case had extended the construction of the statute so as to include persons who were co-sureties for a debt due, not from the bankrupt, but from a third person. That it was not correct to say that one co-surety was liable for the debt of another at the time of the bankruptcy. "The bankrupt had not at that time engaged with his co-surety to provide any part of the money, but the third party, the principal, had engaged with both so to do, and it is then quite a contingency whether the co-surety will be called on by the creditor to pay more than his own share, and until then he has no claim upon the bankrupt" (a). The language of the 177th section of the Bankruptcy Act, 1849 (b), is very similar to that of the 52nd section of 6 Geo. 4, c. 16. Accordingly, in *Adkins v. Farrington* (c), where a surety, who had paid more than his share of the common debt after the bankruptcy of his co-surety, commenced an action against him (after he had obtained his certificate) to recover contribution, it was admitted in the argument that *Wallis v. Swinburne* (d), though a decision on s. 52 of 6 Geo. 4, c. 16, was an authority applicable to the 177th section of 12 & 13 Vict. c. 106 (e). It was, however, held that as the right of contribution actually

(a) See also *Clements v. Langley*, 2 Nev. & Mann., and the judgment of DENMAN, C.J., at p. 277.

(b) 12 & 13 Vict. c. 106.

(c) 5 H. & N. 586.

(d) *Supra*.

(e) And also, it is submitted, to the 173rd section of the same Act.

accrued before the expiration of six months after the filing of the petition by the bankrupt co-surety, it was provable "as a liability to pay money on a contingency" within the 178th section of 12 & 13 Vict. c. 106, and, consequently, that the bankruptcy and certificate of the defendant were an answer to the action.

In the case of *Cary v. Dawson* (*f*) the facts were as follows:—In January, 1869, a company lent a sum in consols to be deposited by the promoters of a bill then before Parliament; and the two plaintiffs, the defendant, and three others, entered into an undertaking with the company that if the bill was thrown out the consols should be returned, and if it passed an equal amount of stock should be transferred to the company, and that a sum in the nature of interest on the value of the consols at the time they were lent, from the end of six months to the date of the transfer, should be paid to the company. In April, 1866, the defendant was adjudged bankrupt, and in July he obtained his order of discharge. In August the bill was passed, but the consols were not transferred to the company till May, 1867, and the plaintiffs were compelled, in June, 1867, to pay, under the undertaking, 500*l.* and the interest. An action was then brought to recover contribution from the defendant of one-sixth of the 500*l.*; the defendant pleaded his discharge in bankruptcy. It was *held*, that as the liability under the undertaking depended on an uncertain event, viz., the date at which the consols should be transferred, the amount of liability was not capable of being ascertained, and the plaintiff's claim was, therefore, not a debt provable under 12 & 13 Vict. c. 106, s. 178, nor under 24 & 25 Vict. c. 134, s. 154, and the defendant was, therefore, not discharged.

Whether a proof can be made under the 37th section of the Bankruptcy Act, 1883, in respect of a contingent

Under B. A.
1883, proof

(*f*) L. R. 4 Q. B. 568; 38 L. J. (N.S.) (Q. B.) 300.

can be made
in respect of
contingent
right of
contribution.

right of contribution as between co-sureties, is a question which has now at length been determined. It has recently been held that under this enactment the liability of a bankrupt co-surety to contribution, though unascertained at the time of the bankruptcy proceedings, is a debt provable in the bankruptcy (a).

Proof by
co-surety
as assignee of
principal
debt.

When one of two co-sureties has paid the creditor the *whole* of the debt and taken an assignment of the securities, he is entitled, under s. 5 of the Mercantile Law Amendment Act, 1856, to *prove* against the estate of his bankrupt co-surety for the *full* amount of the debt, though he can only actually *recover* the just proportion which, as between the sureties, the co-surety is liable to pay (b).

Right of
contribution
not
enforceable
when
fraudulent
to insist
upon it.

The right to contribution cannot be enforced where circumstances are proved in which it would be fraudulent to insist upon it (c). But where it is sought to resist contribution on the ground that the plaintiff has been guilty of fraudulent concealment, it should be remembered that one surety is certainly not under any larger obligation in this respect to his co-surety than the creditor is under to both of them (d). B. and C. became co-sureties for an advance to A. of 500*l.*, of which 125*l.* was, in pursuance of a previous agreement, advanced by A. to C. without B.'s knowledge; afterwards, A. having become bankrupt and absconded, B. and C. were called upon to pay the balance of the advance of 500*l.* B. then brought an action against C., claiming that C. should, as between them, be treated as principal debtor to the extent of 125*l.*, and claiming the benefit of all securities given to him. It was held that the action must be dismissed, the arrangement

(a) *Wolmershausen v. Gullick*, (1893) 2 Ch. 514; and see *Hardy v. Fothergill*, 13 App. Cas. 351.

(b) *In re Parker, Morgan v. Hill*, (1894) 3 Ch. 400, C. A.; *Ex parte Stokes*, De G. 618.

(c) *Per KAY, J.* in *Mackreth v. Walmesley*, 51 L. T. 19; 32 W. R. 819.

(d) *Ib.*

between A. and C. not prejudicially affecting B.'s position and no material fact having been concealed from him (e).

The right of a surety to contribution from his co-sureties may, like other rights, be lost or destroyed in various ways. How right of contribution may be lost.

After the lapse of six years, the right will be barred by the Statute of Limitations. But, as we have seen on a previous page (f), the right to contribution does not *generally* arise at all, and *never*, after payment, in respect of sums paid, until the surety has paid *more* than his share. Therefore, the Statute of Limitations does not begin to run till either the surety has paid *more* than his proper proportion (g), or until the liability of the surety for such amount is *ascertained*, i.e., until the claim of the creditor has been established against him (h). If, therefore, a surety, more than six years before action brought, have paid a portion of the debt due from a principal debtor, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal; for until the latter date it does not appear that the surety has paid more than his share (i). Moreover, the fact that at the time of the action for contribution the statute may have run, as between the principal creditor and the co-surety, affords no ground of defence if not more than six years have elapsed since the liability of the plaintiff as surety was ascertained (k). Statute of Limitations will bar it.

(e) *Macreth v. Walmesley*, *supra*. (f) *Ante*, pp. 343, 355.

(g) *Per PARKE, B. in Davies v. Humphries*, 6 M. & W. 153.

(h) *Wolmershausen v. Gullick*, (1893) 2 Ch. 514.

(i) *Per PARKE, B. in Davies v. Humphries*, *ubi supra*.

(k) *Wolmershausen v. Gullick*, *supra*. The contrary appears to have been held in *America*, in *Shelton v. Farmer*, 9 Bush (Ky.) 314. If the right to contribution were *not* an *equitable* doctrine, but rested solely on *implied contract* (see *ante*, p. 342), then, *semble*, if the Statute of Limitations barred the creditors right of action against the surety, it would also bar the remedy for contribution.

Time given to surety by creditor does not affect the right of contribution.

Whether right of contribution affected by release of one of several co-sureties ;

or by co-surety's discharge of principal debtor.

Right of surety to benefit of securities held by co-surety.

The surety's right of action for contribution after he has paid, is not lost or affected by the circumstance that the creditor may have given *him* (the surety) time for payment (a).

It seems never to have been decided *in England* whether a surety deprives himself of his right of action against the other co-sureties by releasing *one* of several co-sureties with him. However, from the *American* case of *Fletcher v. Grover* (b), it would seem that a discharge of one surety discharges the other sureties for such proportion only of the debt as, upon a payment of the whole debt, they would be entitled to have recourse to him for. Whether a surety who discharges the principal debtor can afterwards recover contribution from his co-surety has not yet been decided, though the point has been raised (c).

In addition to the right of contribution from his co-sureties which a surety who has paid the whole debt possesses, such a surety has another important right ; for it is laid down that " sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities " (d).

Where one of two co-sureties has paid the creditor the whole of the debt and taken an assignment of the securities, he is entitled under s. 5 of the Mercantile Law Amendment Act (e), to bring an action against his co-surety, or to prove against his estate, as an assignee

(a) *Dunn v. Slee*, 1 Moore 2.

(b) 11 N. Hamp. R. 368.

(c) *Vorley v. Barrett*, 1 C. B. (N.S.) 225 ; 26 L. J. C. P. 1.

(d) 1 Story, Eq. Jurisprudence, par. 499 ; 19 & 20 Vict. c. 97, s. 5 ; and see *Done v. Walley*, 2 Ex. 198 ; 17 L. J. Ex. 225 ; 12 Jur. 338 ; *In re Albert Life Assurance Co., Ex parte Western Life Assurance Society* L. R. 11 Eq. at p. 177.

(e) See this section *ante* p. 327.

of the creditor, for the full amount of the debt, though he can only recover the just proportion which, as between the sureties, the co-surety is liable to pay (*f*). But *quære* whether the result would be the same if the surety claimed under his right of contribution, and not as assignee of the creditor (*g*). A co-surety who has satisfied a judgment obtained by the creditor against the principal debtor and his sureties is entitled, under s. 5 of the Mercantile Law Amendment Act, to stand in the place of the judgment debtor, and this right is not affected by the circumstance that such surety has not obtained an actual assignment of the judgment (*h*).

It has recently been decided that a surety who has obtained from the principal debtor a counter security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having such security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security (*i*). So, where several persons joined in a promissory note as sureties for C., the payee of the note effecting policies on the life of C., and afterwards one of the co-sureties paid, with the assistance of his father E., the said promissory note, whereupon the policies were assigned to E., who, on C.'s death, received the amount due under them from the insurance office, it was held that the co-surety and his father must be treated as one person, and that the claim for contribution against a deceased's co-surety's estate

Co-surety is bound to bring into hotchpot whatever he receives from counter security obtained by him from principal debtor.

(*f*) *In re Parker, Morgan v Hill*, (1894) 3 Ch. 400; *Ex parte Stokes*, De G. 618, 621.

(*g*) *Ib.* : *per* DAVEY, L.J.

(*h*) *In re M'Myn, Lightbown v. M'Myn*, 33 Ch. D. 575.

(*i*) *Steel v. Dixon*, 17 Ch. D. 825; 50 L. J. Ch. 591; 45 L. T. 142; 29 W. R. 735, following the *American* cases of *Miller v Sawyer*, 30 Vermont, 412; and *Hall v. Robinson*, 8 Iredell, 56.

would be allowed only after the moneys received under the policies had been brought into account as a set-off (a). When, therefore, by means of the counter-security, the surety has been repaid what he has paid on account of the principal debt, and has shared the amount thus received by him with his co-sureties, he will again be entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise, and so on until the *whole* of the payments made by the co-sureties, on account of the principal debt, have been refunded, or the value of the counter-security has been exhausted (b). On the other hand, though one *co-surety* is thus entitled to the benefit of counter-securities given by the debtor to another co-surety, it has recently been held that the proposition that the principal *creditor* is entitled to the benefit of all counter-bonds or collateral security given by the principal debtor to the surety, cannot be supported (c). In this connection, it may be mentioned that a bill of sale in favour of a surety for any moneys he may be called upon to pay under his guarantee is void under the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9 (d).

Creditor not entitled to counter-securities received by surety from debtor.

(a) *In re Arcedekne, Atkins v. Arcedekne*, 24 Ch. D. 709; 53 L. J. Ch. 102; 48 L. T. 725; and see *Ellesmere Brewery Co. v. Cooper and Others*, (1896) 1 Q. B. 75.

(b) *Berridge v. Berridge*, 44 Ch. D. 168.

(c) *In re Walker, Sheffield Banking Co. v. Clayton*, (1892) 1 Ch. 621; but see *Maure v. Harrison*, 20 Vin. Abr. 102, tit. Surety; 1 Eq. C. Ab. 93; *Wright v. Morley*, 11 Ves. 12, 22; see also *M'Mahon v. Fetherstonhaugh*, (1895) 1 Ir. R. Ch. D. 182, where, under somewhat special circumstances, the creditor was held to be entitled to the benefit of a counter security given by the principal to the surety, on releasing the latter's estate, which was insolvent, from liability.

(d) *Hughes v. Little*, 18 Q. B. D. 32, C. A.

CHAPTER VI.

THE DISCHARGE OF THE SURETY.

THE persons who may be parties to a contract of suretyship; the mode in which such a contract is formed; the operation of the Statute of Frauds upon the contract of guarantee, and the liabilities and rights of the surety under it, have all been discussed in the preceding chapters. In this chapter it now only remains to consider, how the contract of suretyship may be determined, and the surety discharged from all liability thereunder.

Before discussing the different grounds of discharge, it may be as well to mention that, even before the fusion of law and equity effected by the Judicature Act, 1873 (*e*), the same principles which were held to discharge the surety in equity also operated to discharge him at law (*f*); and that, where equity had *concurrent* jurisdiction, a court of equity would not send a party suing there to a court of law for the discharge to which he was equally entitled in equity (*g*).

No conflict ever existed between legal and equitable doctrines governing the discharge of the surety.

The ways in which a surety may be discharged from his suretyship are exceedingly numerous, for a surety is a "*favoured debtor*" (*h*). And, indeed, it is somewhat difficult to state systematically all the different modes in which the surety's release may be effected, or to make such an arrangement of them as will show at once the various principles upon which they depend.

Ways in which surety may be discharged are very numerous.

(*e*) 36 & 37 Vict. c. 66, s. 25 (11).

(*f*) *Per* SELBORNE, L.C., *In re Sherry, London and County Banking Co. v. Sherry*, 25 Ch. D. at p. 703; 53 L. J. Ch. 404; 50 L. T. 227; 32 W. R. 394; *Samuel v. Howarth*, 3 Mer. 277, 278; 1 Storey, Eq. Jur., 10th ed., par. 325, and note 3, par. 325; *Strong v. Foster*, 17 C. B. 201, 219; *Cooper v. Evans*, L. R. 4 Eq. 45; *Mackintosh v. Wyatts*, 3 Hare, 562; *Hawkshaw v. Perkins*, 2 Sw. 539; *Eyre v. Everett*, 2 Russ. 381.

(*g*) *Samuel v. Howarth*, *supra*, and see *Cross v. Sprigg*, 6 Hare, 552.

(*h*) *Per* TURNER, L.J., in *Wheatley v. Bastow*, 7 De G. M. & G. 279, 280.

Division of
this chapter.

Speaking generally, however, under the law of principal and surety, a creditor must not either act in a manner inconsistent with the contract of suretyship itself, or do anything to prejudice the right of contribution between the co-sureties; for, should he do so, the surety will be released, either wholly, or *pro tanto* (a). It is believed that all the modes in which a surety may be discharged group themselves under one or other of the following classes:—

- I. The surety is discharged by matters which invalidate the contract of suretyship *ab initio* (*infra*).
- II. The surety may be discharged by a revocation of the contract of suretyship (p. 388).
- III. The surety may be discharged by the conduct of creditor (p. 394).
- IV. The surety may be discharged by the fulfilment of the contract (p. 450).
- V. The surety may be discharged by the creditor releasing him from liability under his guarantee (p. 461).
- VI. The surety may be discharged by the operation of the Statute of Limitations (p. 462).

It is proposed to discuss all these classes of discharges of the surety in the above order.

Matters
invalidating
contract of
suretyship
ab initio.

I. The surety may be discharged by matters invalidating the contract of suretyship *ab initio*. There are certain things which put an end to all contracts, whatever their nature, and make them void from their very foundation; and guarantees, like all other contracts, are liable to be defeated by any of these means. The principal things which thus avoid a contract as from its very foundation are—(1) fraud (p. 365); (2) an alteration of the written instrument in which the contract is contained (p. 382); (3) failure of the consideration on

(a) *Re Wolmershausen, Wolmershausen v. Wolmershausen*, 62 L. T. 541; and see *Ward v. National Bank of New Zealand*, 8 App. Cas. 755.

which the contract is founded (p. 385); and (4) breach of condition made by surety that there shall be a co-surety liable with him for the principal debtor (p. 386). Let us consider these consecutively.

(1) *Fraud of the creditor discharges the surety.*

Fraud of
creditor
discharges
surety.

Fraud vitiates all contracts; including, of course, the contract of guarantee. Fraud cuts down everything, and the law sets itself against it to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition, technical or otherwise, so that justice and truth may prevail (b). It is not proposed to define fraud, as it is impossible to frame a definition of it that would be applicable to all cases, because what is fraud in one case is not deemed to be so in another. Courts of equity always avoided imprudently hampering themselves by defining, or laying down as a general exclusive proposition, what should be held to constitute fraud (c). This was no doubt because, had they done so, human ingenuity would soon have found a means of evading any proposition that might have been formulated.

A fraud affecting the contract of guarantee may be either a fraud *antecedent* to the execution of the guarantee, or may be a fraud *subsequent* to the execution of such contract.

Fraud may
precede or
follow
execution of
contract.

First, then, as to fraud *antecedent* to the execution of the contract of guarantee. This, like other frauds, may consist either in the *suppression* or *concealment* of that which is true, or in *misrepresentation*, which is the *assertion* of that which is *false*.

Antecedent
fraud.

(b) See *per* POLLOCK, C.B., in *Rogers v. Hadley*, 32 L. J. Ex. at p. 248. It has been held that a sheriff cannot recover on an indemnity bond which has been procured by his own officer's fraud: *Raphael v. Goodman*, 3 N. & P. 547; 8 A. & E. 565.

(c) Hovenden's Treatise on the Practice to prevent Fraud, vol. i., pp. 13, 14, and cases there cited. It is laid down in Fry's Specific Performance, 3rd ed., p. 274, that "to constitute fraud there must coincide in one and the same person knowledge of some fact, and conduct, inequitable, having regard to such knowledge."

Suppression
or conceal-
ment.

Suppression or concealment, constituting a fraud prior to the guarantee, is the most usual form of fraud by which guarantees are affected.

Rule in
assurances
as to
disclosure of
all material
facts not
applicable to
guarantees.

It seems once to have been thought, that the rule as to the disclosure of all material facts prevailing in assurances upon marine and life risks, applies also to contracts of guarantee—the rule that, upon a policy to cover a marine or life risk, the assured is bound at his peril to disclose all material circumstances to the assurer, and that their non-disclosure, though innocent and not fraudulent, vitiates the contract (*a*). The impression that the rule in question applied also to guarantees was created by a dictum of Lord *Truro* in *Owen v. Homan* (*b*). This was, however, corrected in

*North British
Insurance Co.
v. Lloyd.*

the case of *The North British Insurance Co. v. Lloyd* (*c*). There the plaintiffs had lent to Sir *T. Brancker* 10,000*l.*, payable in a year, on the deposit of some shares, with the further stipulation that if the market value of the shares should fall 20*l.* per cent. below 10,000*l.* he should furnish new shares or pay their value, so as to leave a surplus of 20*l.* per cent. The shares having fallen in value below that amount, when the time for the repayment of the loan arrived, the time was extended to a further period on the deposit of additional shares and the acceptance of Mr. *Brancker*, the brother of Sir *T. Brancker*. Before the loan became due, in pursuance of the terms of this second arrangement, Mr. *Brancker* applied to be released from his acceptance upon procuring the guarantee of the defendant and three others for 500*l.* each. Sir *T. Brancker* then informed the defendant of the loan and of its terms, and told him that unless he could procure security his shares would

(*a*) See statement of this rule by Lord *ESHER*, M.R., in *Asfar & Co. v. Blundell*, (1896) 1 Q. B. at p. 129.

(*b*) 3 Mac. & G. 378.

(*c*) 10 Exch. 523. See also *Wythes v. Labouchere*, 3 De G. & J. 593; and per *FRY*, J., in *Davis v. London and Provincial Marine Insurance Co.*, 8 Ch. D. 469, 475; 47 L. J. Ch. 511; 38 L. T. 478; 26 W. R. 794.

be sold at a great loss; but the arrangement as to the withdrawal of Mr. *Brancker's* acceptance was not communicated to the defendant, and he was wholly ignorant of it. The defendant executed a guarantee which did not refer to Mr. *Brancker's* acceptance, but recited the consideration to be the original loan, and the plaintiffs not requiring any further security in the event of the depreciation of the shares as provided for by the original agreement. In an action on the guarantee it was held, that the non-communication of the private arrangement between the plaintiffs and Sir *T. Brancker* and Mr. *Brancker* did not amount to constructive fraud, and afforded no defence to the action. *Pollock*, C.B., in his judgment says, "The non-disclosure of the circumstance of the change of security, even if it had been material, would not have vitiated the guarantee, unless it had been fraudulently kept back; and there was no ground to impute fraud, in fact, to the plaintiffs or their agents. They might well have supposed that the desire of Mr. *T. Brancker* to get rid of his own guarantee did not indicate any bad opinion of his brother's character or solvency, but arose from a wish on other grounds to contract his liabilities" (*d*).

In this case, therefore, the court was of opinion that there was no fraud, that the circumstance not disclosed was not a *material circumstance*, and that, even if it had been, its concealment, unless *fraudulent*, would not have the effect of vitiating the guarantee. Now it is somewhat difficult to reconcile this decision with the previous case of *Railton v. Mathews* (*e*). There a party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers

Railton v.
Mathews.

(*d*) And see *Lee v. Jones*, 17 C. B. (N.S.) 482; 14 C. B. (N.S.) 386.

(*e*) 10 Cl. & F. 935. See observations on this case by QUAIN, J., and BLACKBURN, J., in *Phillips v. Foxall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 27 L. T. 231; 20 W. R. 900; and see *Mayor of Durham v. Fowler*, 22 Q. B. D. 394.

discovered irregularities in the agent's accounts and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit *prior* to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue, directed by the court, to try whether the surety was induced to sign the bond by undue concealment, or deception on the part of the employers, the presiding judge directed the jury that the concealment, to be undue, must be wilful and intentional, with a view to the advantages the employers were thereby to gain. It was held by the House of Lords (reversing the judgment of the Court of Session) that the direction was wrong in point of law, that the mere non-communication of circumstances affecting the situation of the parties material for the surety to be acquainted with, and within the knowledge of a person obtaining a surety bond, is undue concealment, *though not wilful or intentional, or with a view to any advantage to himself*.

The only way in which this case can be reconciled with the decision given in *North British Insurance Co. v. Lloyd (a)*, is on the assumption that the objection of the House of Lords must be confined to that part of the judge's charge where he ruled, that a concealment does not vitiate a guarantee unless the party guilty of it had his own particular advantage in view. Certainly, Lord *Cottenham* seems to assert, in this case, that *unintentional* concealment would be sufficient to vitiate a guarantee. Lord *Campbell*, however, is careful to separate the alleged misdirection of the judge into *two* parts. He says, "Now, according to my notion of the issue, that is an entire misconception of it: according to this direction, although the parties acquiring the

(a) *Supra*.

bond had been aware of the most material facts which it was their duty to disclose, and the withholding of which would avoid the bond, if they did not wilfully and intentionally withhold them, that is to say, if they had forgotten them, or if they thought by mistake, that, in point of law or morality, they were not bound to disclose them, then, according to the holding of the learned judge, it would not be a concealment. *But the learned judge does not stop there*; he goes on, with a view to the advantage they were thereby to receive; introducing these words conjunctively, and, in effect, saying that it was not an undue concealment, unless they had their own particular advantage in view. *That appears to me a misconception.*" It would, therefore, seem, that Lord Campbell might have agreed with the learned judge if he had only laid down that concealment, if not wilful and intentional, will *not* vitiate a guarantee.

The decision in the case of the *North British Insurance Co. v. Lloyd (b)*, is certainly quite in harmony with the doctrine which prevailed in courts of equity, namely, that, in order to entitle a surety to relief *in equity*, on the ground of misrepresentation or concealment, at the time of the contract, he must make out a case amounting to *fraud (c)*.

When we speak of a *fraudulent* as distinguished from an *innocent* concealment, we speak of one which is *wilful* and *intentional*. However, it is necessary to observe, that though every *fraudulent concealment* is wilful and intentional, the converse of that proposition is not correct, and that *every wilful and intentional concealment* is not necessarily by the law of England *fraudulent*. But we have already shown that no concealment will vitiate a guarantee unless it be *fraudulent*. Therefore, it is not every wilful and intentional con-

What amounts to fraudulent concealment which will vitiate a guarantee.

(b) 10 Exch. 523.

(c) *Pledge v. Buss*, Johns. 663.

concealment that will have this effect, since every wilful and intentional concealment is not necessarily fraudulent (a). Now it appears that there are certain things which it is *the duty* of the creditor *spontaneously* to disclose to the surety, and that there are certain other things which the creditor need not disclose unless and until requested to do so by the surety. If, therefore, the creditor, *wilfully* and *intentionally*, omit to disclose those things which he is bound *spontaneously* to disclose, he is of course guilty of a *fraudulent* concealment, which vitiates the guarantee, and relieves the surety from liability. But an intentional and wilful *concealment* (as distinguished from a *misrepresentation*) of those things which he need not disclose unless the surety requests him to do so, will not amount to a *fraudulent concealment*, and will not therefore vitiate the guarantee.

What things
the creditor
is bound to
disclose spon-
taneously.
General
principles.
Hamilton v.
Watson.

We will now endeavour to explain what things the creditor is bound *spontaneously* to disclose, and what are the things which the surety must *ascertain for himself* from the creditor.

In *Hamilton v. Watson* (b), Lord Campbell lays down "that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect, and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the

(a) See case of *Mackreth v. Walmesley*, 51 L. T. 19; 22 W. R. 819.

(b) 12 Cl. & Fin. 109, 119.

question, and he must gain the information which he requires."

In *Wythes v. Labouchere* (c) Lord Chancellor *Wythes v. Chelmsford* said: "The concealment, too, must be of *Labouchere*. some material part of the transaction itself between the creditor and his debtor, to which the suretyship relates. The creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage, which will render his position more hazardous."

In the case of *Davies v. London and Provincial Marine Insurance Co.* (d), Fry, J., thus lays down the law as to disclosure of circumstances by parties to contracts:—"Where parties are contracting with one another each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to show that the duty existed. . . . It has been argued here that the contract between the surety and the creditor is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been held that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law (e). I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure, and therefore I shall not determine this case on that view. But I do think that the contract of suretyship, is, as expressed by Lord Westbury in *Williams v. Bayley* (f), one which 'should be based upon the free and voluntary agency of the individual who enters into it.'"

(c) 3 D. & J. 593, 609.

(d) 8 Ch. D. 469, 474, 475.

(e) See Anson on Contracts, 8th ed., p. 161.

(f) L. R. 1 H. L. 200, 219.

In the *American* case of *Farmers' National Bank v. Van Slyke* (a), it was laid down by *Haight, J.*, that where a person taking a security knows certain facts and is present, having an opportunity to inform the proposed surety thereof, and having reason to believe that the proposed surety does not know such facts and is being deceived and defrauded into becoming such surety, it is the duty of such person to inform the surety of such facts, and the acceptance by him of the surety under the circumstances, without enlightening him as to the facts, constitutes a fraud which will avoid the contract of suretyship.

We will now pass on to *particular* examples:—

Particular examples where non disclosure of circumstances complained of.

Surety ought to be informed of every private bargain between creditor and principal debtor, varying degree of surety's responsibility. Sometimes also necessary to disclose agreement between creditor and person other than principal debtor.

Where an agreement between the vendors and the vendee of goods, that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors, was not communicated to the person guaranteeing payment of the goods, it was held, that on that account the guarantee was void (b), for a party giving a guarantee ought to be informed of every private bargain made between the vendor and the vendee of goods which may have the effect of varying the degree of his responsibility (c). It would seem, moreover, that it may, under certain circumstances, be necessary to communicate to the surety the existence and nature of an agreement entered into by the person receiving the guarantee and some third person other than the principal debtor. This would appear to be so from the case of *Stiff v. The Local Board of Eastbourne* (d). The facts of this case are as follows:—By a memorandum of agreement between one *James Hayward* of the one

(a) 56 N. Y. S. C. R. 7.

(b) *Pidcock v. Bishop*, 3 B. & C. 605. See remarks on this case in *Ex parte Sharp*, 3 M. D. & D. 504.

(c) *Per ABBOTT, C.J.*, in *Pidcock v. Bishop*, *ubi supra*. See also *Stone v. Compton*, 5 Bing. N. C. 142.

(d) 19 L. T. (N.S.) Ch. 408.

part, and the defendants of the other part, *Hayward* contracted to execute certain sewage works at Eastbourne, conditionally, among other things, on his being from time to time paid for the work done by him under the contract upon the certificate of a surveyor, who was defined as being the surveyor of the defendants. By a bond of even date with the above agreement, *Hayward* as principal, and the plaintiff and another as sureties, became jointly and severally bound to the defendants in the penal sum of 5,000*l.* for the due performance of the contract on or before a certain day. Subsequently *Hayward* became insolvent, was unable to complete the contract, and the defendants thereupon commenced an action against the plaintiff in order to enforce his penalty under the bond. This action the plaintiff sought to stay by injunction. It appeared that previously to the contract with *Hayward* the defendants had entered into an agreement with the Duke of Devonshire, who, possessing a good deal of property in the neighbourhood, was interested in the sewage works, that the works should be executed “under the joint superintendence and control of the engineer and surveyor of the duke and of the local board, or their surveyor or clerk, or clerk of the works.” At the time of the execution of the bond the plaintiff was kept in ignorance of this agreement. It was held, that the plaintiff was relieved from liability as surety under his bond, because at the time of its execution by him a material circumstance was concealed from him, and that an injunction restraining proceedings at law against the surety upon the bond must, therefore, be granted. Vice-Chancellor *Stuart* delivered the following judgment in this case:—“In contracts of this description it is of the utmost importance to know who is to be the surveyor, for on him depends the payment. In the contract between the defendants and *Hayward* it is distinctly stated, as one of the conditions, that

the surveyor is to be the surveyor of the Eastbourne Local Board; yet it now turns out that the Duke of Devonshire's surveyor is to be associated with him. The fact of this circumstance having been concealed from the plaintiff at the time of the execution of the bond is, in my opinion, sufficient to exonerate him from all liability. The injunction must, therefore, be granted."

Whether it
be necessary
to disclose to
surety past
misconduct
of principal
debtor.
Smith v.
Bank of
Scotland.

In *Smith v. The Bank of Scotland (a)*, a guarantee was given for the good behaviour of a bank clerk. The bank concealed from the surety—or rather neglected to disclose to him—the circumstance that the principal had, *previously to the giving of the guarantee*, mis-conducted himself in his office. It was held, that this concealment or omission to disclose ought to have been admitted to proof by the court below on the ground, apparently, that it was so little to be expected that a bank would continue in their service such a clerk, that the application for a security under these circumstances amounted to holding him forth to the sureties as a person of trust, and that this amounted to fraud (b). So where a person was asked to indorse, as surety, two promissory notes, and was not informed that such notes were required in lieu of other notes bearing indorsements forged by the principal debtor, it was held, in *America*, that there had been a fraudulent concealment sufficient to avoid the contract of suretyship (c).

Lawder v.
Lawder and
Others.

The *Irish* case of *Lawder v. Lawder and Others (d)* is likewise a case of concealment of the principal

(a) 1 Dow. 272. See observations on this case by QUAIN, J., and BLACKBURN, J., in *Phillips v. Foxall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 27 L. T. 231; 20 W. R. 900.

(b) See also *Leith Banking Co. v. Bell*, 8 Shaw & Dunl. 721; 5 Wils. & Shaw, 703; *Fishmongers' Co. v. Maltby*, cited p. 294 of 1 Dow.

(c) *Farmers' National Bank v. Van Slyke*, 56 N. Y. S. C. R. 7.

(d) L. R. 7 C. L. 57; 21 W. R. 439; and see *Mayor of Durham v. Fowler*, 22 Q. B. D. 394, 423, 424.

debtor's misconduct. There an action was brought by a county treasurer against a surety to a bond of a defaulting county cess collector. The surety pleaded *equitably* that the plaintiff knew that the cess collector, when previously engaged in that office, had misconducted himself, and yet that the plaintiff had not informed the defendant (surety) of this fact. It was held that this defence was inadmissible, as there was no privity between the surety and the plaintiff in his official capacity.

In *Ludekens v. Pscherhofer* (e), an *American* case, it was held, that the omission of the obligee to advise a surety under a bond of indemnity of the refusal of another to join in such bond as surety, because he considered the principal debtor to be untrustworthy, is not, of itself, a defence to an action brought against the surety upon the bond.

In *Lee v. Jones* (f), it was held by the Court of Exchequer Chamber, that the non-communication by the plaintiffs to defendant of the fact that the principal debtor was indebted to the plaintiffs, at the time the defendant executed the contract of guarantee, was evidence in support of the defendant's plea of fraud. This, however, was a case of misrepresentation rather than one of mere concealment.

Lee v. Jones.
Whether
principal
debtor's
indebtedness
to creditor
should be
disclosed.

In *Roper v. Cox* (g), it was held by the *Irish* Common Pleas Division, that where a guarantee was given for the due payment of rent by H., the surety could not escape from his liability under it by proving that, prior to the making of the guarantee, H. had been tenant to the plaintiff of the lands at a rent, and had been guilty of gross irregularity and delay in payment

(e) 83 N. Y. S. C. Reps. 548.

(f) 17 C. B. (N.S.) 482; *S. C.*, 14 C. B. (N.S.) 386; 11 Jur. (N.S.) 81; 34 L. J. C. P. 131; 13 W. R. 318. See also *Williams v. Rawlinson*, 3 Bing. 71.

(g) 10 R. L. Ir. 200; and see *Home Insurance Co. v. Holway*, 39 Amer. R. 179 (U.S.).

of such rent, and at the date of the guarantee was indebted to the plaintiff in a large sum for arrears of such rent, of which the surety was ignorant.

*Guardians of
Stokesley
Union v.
Strother.*

In the case of *The Guardians of the Stokesley Union v. Strother (a)*, the bond was conditioned for the faithful discharge of the duties of a relieving officer. At the time of the execution of the bond there was a balance of 206*l.* due from the relieving officer in respect of money which had been received by him as relieving officer. That fact was not communicated to the surety. It was held, that as the existence of the balance did not necessarily involve any imputation of misconduct against the relieving officer, it was not a material fact which the guardians were bound to communicate to the surety before he executed the bond. In this case, *Coleridge, J.*, while admitting that fraud might be proved by the non-communication of any material fact, considered that, inasmuch as the relieving officer, *from the nature of his office*, must be sure to have money in hand, the non-communication of this fact was no fraud upon the surety.

Subsequent
change in cir-
cumstances as
they existed
when surety-
ship first
contemplated
should be
disclosed.

*Davies v.
London and
Provincial
Marine
Insurance Co.*

It may sometimes be necessary to communicate to the surety subsequent changes which have occurred in the circumstances under which the suretyship was to be entered into.

In *Davies v. London and Provincial Marine Insurance Co. (b)*, the facts were as follows:—The officers of a company believing that a felony had been committed by one of their agents in whose accounts there was an alleged deficiency, directed his arrest. Certain friends of the defaulting agent thereupon proposed to deposit money by way of security for any deficiency. Pending the negotiations, the officers of the company withdrew directions for the agent's arrest on being advised that

(a) 22 L. T. (o.s.) 84.

(b) 8 Ch. D. 469; 47 L. J. Ch. 511; 38 L. T. 478; 26 W. R. 794.
See also *Williams v. Bayley*, L. R. 1 H. L. 200.

his acts did not amount to felony. This fact was not communicated to the agent's friends, who subsequently agreed to make the deposit, and carried out such agreement. It was held, that the change of circumstances ought to have been stated to the intended sureties, and that, therefore, the agreement must be rescinded, and the money returned to the sureties. It was also held, that if the agreement to give security was illegal as compounding a felony, the court would interfere in a case where the money was actually in the hands of trustees, and pressure had been exercised.

The other class of frauds committed prior to the execution of a guarantee, by which its operation is destroyed, consists of *misrepresentations*.

Misrepresentation is the assertion of that which is false. It need not consist of *verbal assertion*, for a *false assertion in writing* will certainly also amount to misrepresentation. Thus, in the case of *Lee v. Jones* (c), which has already been cited (d), the majority of the judges considered that there was "cogent evidence of such a suppression of the truth by the partial, inaccurate and subdulous setting forth by the plaintiffs in the written agreement of facts within their knowledge, material for the proposed sureties to be informed of, as, along with the non-communication of other facts, material for them to know, amounted to a *misrepresentation* to the proposed sureties" that the principal debtor during the five years he had acted as the plaintiff's commission agent, had proved himself to be a man worthy of trust and confidence, "a satisfactory guarantor of others, and himself the safe subject of a guarantee." *Blackburn, J.*, in this case, said: "I think that it must in every case depend upon the nature of the transaction whether the fact not disclosed is such that it is impliedly represented not to exist, and that must be generally be a question of fact proper for a jury."

Discharge of surety by fraudulent misrepresentations.
What is misrepresentation.
Written misrepresentation.
Lee v. Jones.

Verbal
misrepresentation.

*Blest v.
Brown.*

We now come to a case of *verbal misrepresentation*—the case of *Blest v. Brown* (a). There, the plaintiff, as surety, executed a joint and several bond to secure to B. and M. money which might become due to them from A. M. for flour to be supplied by them to A. M. for the purpose, as stated on the face of the bond, of enabling him to carry out a contract with the government. It appeared by the evidence, that B. and M. never supplied A. M. with flour for the purpose of the contract, and also that, at the time when the bond was executed, the plaintiff had inquired of the agent of B. and M., whether there were any trade debts owing from A. M. to B. and M., to which the agent had answered, “No.” It turned out, however, that there was a trade debt owing, but the period of credit had not expired. Sir *J. Stuart*, V.-C., held, that there had been a misrepresentation of a material fact which might have influenced the conduct of the plaintiff in executing the bond, and that, therefore, he was entitled to be relieved from its consequences. On appeal, this decision was affirmed by Lord Chancellor *Westbury*, who said: “Now, it must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, ‘The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end.’”

Guarantee
obtained by

Before quitting the subject of frauds *antecedent* to the

contract of guarantee, it may be well to call attention to a class of cases which are sometimes examples of fraudulent concealment, sometimes of fraudulent misrepresentation, and sometimes partake of both these elements, namely, cases where the surety contends that the guarantee is not binding upon him because he did not rightly understand the nature of the contract he was entering into. It has been thought best to treat these cases together. The general principles deducible from the decisions which have been given in such cases may be shortly stated as follows:—Where a guarantee is obtained by a creditor from a person likely to be under the influence of the debtor, as in the case of a relative just come of age, the onus is thrown upon the creditor of showing that such person understood the transaction and that he did not act under undue influence, otherwise the transaction will be set aside (b). So if the creditor has been guilty of misrepresentation by framing the guarantee in a way calculated to mislead the surety, it would be contrary to equitable principles to allow advantage to be taken of a guarantee executed under such circumstances (c). On the other hand, it seems that a guarantee will not be invalidated by the circumstance that the surety has not been informed, previous to its execution, of its tenor or effect, if he has had full opportunity not only of duly considering it himself, uninfluenced by the representations or presence of the person to whom the guarantee is given, but also of procuring the advice and assistance of his own solicitor. A court of equity will not interfere in such a case, because the surety should have *asked* for information if he required it (d). And though it is

undue
influence or
misrepresentation of its
contents or
effect liable
to be set
aside as
fraudulent.

(b) *White & T. L. C.*, 6th ed. vol. ii., p. 637, 638; *Maitland v. Irving*, 15 Sim. 437.

(c) *Per KINDERSLEY, V.-C.*, in *Small v. Currie*, 2 Drew. 102, 114; *Squire v. Whitton*, 1 H. L. 333.

(d) *Per KINDERSLEY, V.-C.*, in *Small v. Currie*, *ubi supra*; and see *Brown v. Wilkinson*, 13 M. & W. 14.

certainly true that, as a rule, whenever a person can establish that he has been misled as to the contents of a written document he is not bound thereby (*a*), yet it remains doubtful whether if there be a false representation as to the contents of an instrument, a person who is an *educated* person and who might by very simple means have satisfied himself as to what the contents of the deed really were, may not by executing it *negligently* be estopped as between himself and a person who innocently acts upon the faith of its being a valid instrument (*b*). Whether misrepresentation as to the *legal effect* of an agreement in writing or under seal will operate to relieve a party thereto from liability, is doubtful (*c*); but it would seem that a *fraudulent* misrepresentation as to the effect of an instrument may be relied upon as a defence to an action upon it (*d*). However, it appears that a *man of business* who executes an instrument of a short and intelligible description will not be permitted to allege that he executed it in blind ignorance of its real character or under circumstances of haste, surprise or deception (*e*).

Frauds
subsequent
to the
execution
of the
guarantee.

Secondly, frauds, however, may not only be *prior* to the execution of a guarantee, but they may (as has been stated) also be *subsequent to it*. It remains to deal with frauds of this latter description. Fraud *subsequent* to the execution of the guarantee does not

(*a*) *Thoroughgood's case*, 1 Co. R. 435, 442; *Edwards v. Brown*, 1 C. & J. at p. 312; *Foster v. Mackinnon*, L. R. 4 C. P. 704, 711; *Simons v. G. W. Rail. Co.*, 2 C. B. (N.S.) 620; *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1; 34 W. R. 597.

(*b*) *Per* MELLISH, L.J., in *Hunter v Walters*, L. R. 7 Ch. App. 83, 87, 88; but see BYLES, J., in *Swan v. North British Australian Co.*, 2 H. & C. at p. 184.

(*c*) *Lewis v. Jones*, 4 B. & C. 506; *Per* MELLISH, L.J., in *Beattie v. Lord Ebury*, L. R. 7 Ch. App. at p. 802; *Edwards v. Brown*, 1 C. & J. 307; *Ogilvie v. Jeaffreson*, 2 Giff. 353; *Per* BOWEN, L.J., in *West London Commercial Bank v. Kitson*, 13 Q. B. D. at p. 362, 363.

(*d*) *Hirschfield v. L. B. & S. C. Rail. Co.*, 2 Q. B. D. 1.

(*e*) *Wythes v. Labouchere*, 3 De G. & J. at p. 601.

often occur, and there are not, therefore, many examples of this species of fraud to be cited.

If the creditor *connives* at the default of the principal debtor, this will, of course, be quite sufficient to discharge the surety (*f*). Provided it takes the form of *active* connivance amounting almost, if not entirely, to a fraud (*g*), as distinguished from a mere *passive* acquiescence in acts which are contrary to the principal debtor's due fulfilment of his obligations (*h*), but do not amount to actual dishonesty.

Where creditor connives at principal debtor's default.

We have already seen that, in the case of a guarantee for the honesty of another person in an employment, if the person guaranteed *conceals* from the surety, that, *previously* to the giving of the guarantee, the person employed had committed defalcations in the service of the person guaranteed, the surety may be relieved on the ground of *fraud* (*i*.) And, in the case of *Phillips v. Foxall* (*k*), it was decided, that if, *after the execution of such a continuing guarantee*, a *similar* concealment be made, the surety is equally discharged. Thus, if, after the execution of such a guarantee, the person employed is guilty of a dishonest act, or even of the breach (whether accompanied with dishonesty or not) of the duty for the due fulfilment of which another has become surety, and the employer continues to employ such person after knowledge of these facts, the surety is discharged (*l*). Where, however, the person

Fraudulent concealment from surety of subsequent misconduct of principal.

(*f*) *Dawson v. Lawes*, 23 L. J. Ch. 434. See also *Mactaggart v. Watson*, 3 C. & F. 525; *Shepherd v. Beecher*, 2 P. W. 288.

(*g*) *Black v. Ottoman Bank*, 6 L. T. (N.S.) 763; *Dawson v. Lawes*, *supra*; *Mayor of Durham v. Fowler*, 22 Q. B. D. 394; *Madden v. McMullen*, 13 Ir. C. L. Rep. 305; 4 L. T. (N.S.) 180.

(*h*) *Mayor of Durham v. Fowler*, *supra*; *Mayor, etc., of Kingston-upon-Hull v. Harding*, (1892) 2 Q. B. 494.

(*k*) L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 27 L. T. 231; 20 W. R. 900.

(*i*) *Ante*, p. 374.

(*l*) *Phillips v. Foxall*, *ubi supra*; *Sanderson v. Aston*, L. R. 8 Exch. 73. See also observations of MALINS, V.-C., in *Burgess v. Eve*, L. R. 13 Eq. 450. See also *Peel v. Tatlock*, 1 B. & P. 419, 423.

Omission by employer to *suspend* principal who has misconducted himself will not relieve surety where power of *dismissal* not vested in employer.

to whom a guarantee for good conduct of a rate collector had been given merely possessed the power of *suspending* the latter on his being guilty of neglect of duty, the power of *dismissal* being vested in another and higher official, it was held that the doctrine of *Phillips v. Foxall* (a) did not apply, and that the omission to exercise a power of suspension, as distinguished from a power of dismissal, did not terminate the liability of the sureties (b).

Discharge of surety for payment of price of ships by subsequent improper employment of one of such ships by vendor.

Another instance of wrongful conduct subsequent to the formation of the relationship of principal and surety discharging the latter is afforded by the case of *Burke v. Rogerson* (c), in which the facts were as follow:—The defendant agreed to sell two ships to the D. Co., to be paid partly in bills of exchange accepted by the company, with liberty to the defendant to freight one of the vessels. The plaintiffs agreed to indorse the bills by way of surety. Shortly afterwards the defendant, assuming to act as agent of the company, despatched one of the vessels to Constantinople, laden, on his own account, with munitions of war, for the Circassians, who were then at war with Russia. This was not known either to the company or to the plaintiffs. It was held that the defendant having exposed the ships to extraordinary risks, and having wrongfully concealed this from the plaintiffs, it amounted to a release of the plaintiffs from their liability as sureties.

Alteration in instrument of guarantee after its execution may discharge surety.

(2.) *An alteration made in the instrument of guarantee after its execution may discharge the surety.*

It was decided in *Pigot's case* (d), that the alteration of a *deed* by the *obligee*, in a *point material*, or not *material*, avoids the deed; but the alteration by a

(a) *Ubi supra*.

(b) *Byrne v. Muzio*, 8 L. R. (Ir.) 396.

(c) 12 Jur. (N.S.) 635; 14 L. T. 780.

(d) 11 Co. Rep. 27 a.

stranger, without the privity of the obligee, does not avoid the deed, unless the alteration is in a *material* point. This doctrine has been, *in part* at all events, extended to written instruments not *under seal*, and, among others, to guarantees. Thus, in the case of *Davidson v. Cooper* (e), a plea alleged that, after the making of the guarantee sued on (which was *under seal*), and whilst it was in the hands of the plaintiff, it was, without the knowledge of the defendant, by some person, to him unknown, altered in a *material* particular, by affixing two seals by and near to the signatures of the defendants, as and for their seals, thereby causing the guarantee to purport to be the deed of the defendants. It was held, that the guarantee became void in law, and that the plaintiff could not recover (f). In *Ellesmere Brewery Co. v. Cooper and Others* (g), the facts were as follows:—Four persons, as sureties for a principal, executed a joint and several bond of suretyship, by the terms of which the liability of two of them was limited to 50*l.* each, and that of the other two to 25*l.* each. One of those, whose liability was limited to 50*l.*, after the other three had executed the bond, executed it himself, but added to his signature the words “25*l.* only.” The obligee accepted the bond so executed without objection, and subsequently the principal became in default. It was held that the effect of the added words was to make a material alteration in the bond, so that the first three signatories were thereby discharged from their obligation, and that as the last signatory only executed the bond as a joint and several bond, he also was not bound by it. Again, in the case of *The Bank of Hindostan, China and Japan v. Smith* (h), an action was brought on a

Davidson v. Cooper.

Bank of Hindostan, China and Japan v. Smith.

(e) 11 M. & W. 778; S. C. (Cam. Seacc.), 13 M. & W. 343, 352.

(f) The removal of the seal of one of the obligors to a several bond does not render such bond invalid as to the others. See *Collins v. Prosser*, 1 B. & C. 682.

(g) (1896) 1 Q. B. 75.

(h) 36 L. J. C. P. 241.

guarantee not under seal, whereby, as alleged in the declaration, the defendant promised that, if the plaintiffs paid a large sum of money to the liquidator of another bank, he (the defendant) would be responsible for the repayment of such sum and would indemnify the plaintiffs. The plea to the declaration in this action set out the guarantee itself and alleged that the contract was to contribute *aliquot* parts, as the bank well knew, and that several of the names of the persons who had signed the guarantee were struck out whilst the instrument of guarantee was in the plaintiff's possession. It was held, that this alteration alleged in the plea precluded the bank from recovering, and that as the alteration appeared to have been made by the bank secretary, it was just as if the bank itself had made it.

However, so far, at any rate, as instruments not under seal are concerned, the doctrine of *Pigot's case* is qualified by the modern case of *Aldous v. Cornwell* (a). In this latter case the Court of Queen's Bench held that in such a case (the instance actually under consideration being that of a promissory note) an immaterial alteration, though made by a party to it, does not render it void (b). Now in *Pigot's case* it was, as before observed, laid down that any alteration in a deed, *whether material or not*, made by the obligee avoided the deed. But as in *Pigot's case* it was found, as a fact, that the alteration, which was not a material one, was made by a *stranger*, the Court of Queen's Bench, in *Aldous v. Cornwell* (c), did not consider themselves bound by *Pigot's case* (d). Moreover, even had this not been so, it is conceived that, inasmuch as in *Pigot's case* the alteration was in a deed, whilst in

(a) L. R. 3 Q. B. 573.

(b) See also *Garrard v. Lewis*, 10 Q. B. D. 30; *Suffell v. Bank of England*, 7 Q. B. D. 270; 9 Q. B. D. 555.

(c) *Ubi supra*.

(d) See the judgment in *Aldous v. Cornwell*.

Aldous v. Cornwell it was in an instrument *not under seal*, the Court of Queen's Bench were, in deciding the latter case, in no sense bound by the former case. And, in all probability, even should the same question ever arise in reference to a deed, our judges would be disposed to follow *Aldous v. Cornwell*. And, in accordance with the principle acted on in *Aldous v. Cornwell*, where an alteration *not material* to the defendant's liability was made in a guarantee by the plaintiff, with the consent of the principal debtor, it was held that the guarantee was not thereby avoided (e).

The ground on which an alteration avoids an instrument is explained in *Davidson v. Cooper* (f), to be "that a party who has the custody of the instrument made for his benefit is *bound* to preserve it in its original state."

Why subsequent alteration of an instrument avoids it.

(3.) *Failure of the consideration for which the guarantee was given discharges the surety.*

Failure of consideration for which guarantee given discharges the surety.

Failure of the consideration for which the guarantee was given will of course discharge the surety, just as failure of consideration in any other case releases the promiser. An instance of a failure of consideration for a guarantee is afforded by the case of *Cooper v. Joel* (g). In that case, upon the eve of a sale by the sheriff, a surety gave a written guarantee for payment of the judgment debts by instalments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and, in consequence, the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. It appeared that representations were made on behalf of the

(e) *Andrews v. Lawrence*, 19 C. B. (N.S.) 768.

(f) *Per* Lord DENMAN, C.J., 13 M. & W. at p. 352.

(g) 1 De G. F. & J. 240.

judgment creditors, when they took the guarantee, that they had power to stop the sale, and that it would be stopped. It was held that the surety was entitled to have the guarantee given up.

In the case of *Ex parte Agra Bank (a)*, it was decided, on the facts of the case, that there was no failure of consideration. There a bank granted a letter of credit to a company, and agreed to accept bills drawn upon them by the company in respect of that credit, on the terms that the company should ship tea and forward bills of lading, invoices and policy of insurance on the tea to the bank, and should also draw on B. & Co. bills to be accepted by B. & Co. to an amount sufficient to cover the amount authorized by the letter of credit. B. & Co. guaranteed the performance by the company of these terms, "holding themselves responsible for the same." The company drew on the bank, and the bank accepted the bills, but, owing to the failure of the bank after the dates when the bills were drawn, and before they became due, the company shipped no tea, and did not perform any of the terms agreed on. The bills accepted by the bank were, it would appear, ultimately paid. It was held that the failure of the bank was no reason for the default of the company to perform its part of the contract, and that B. & Co. were liable on their guarantee (b).

Where guarantee to be executed by a co-surety is a condition precedent, his failure to execute discharges the other co-surety *ab initio*.

(4.) *Where surety executing a guarantee stipulates, as a condition precedent to his liability, that there shall be a co-surety, and this condition is not complied with, he is discharged ab initio.*

The cases bearing on this subject have already been discussed in a previous chapter (c), to which the reader

(a) L. R. 9 Eq. 725.

(b) This case rests mainly upon another ground, though the question of failure of consideration was also involved. *Post* p. 445.

(c) *Ante*, Cap. IV., pp. 221—224.

is referred. It will be sufficient, therefore, in this place to state, that when the condition precedent above mentioned has not been complied with, the surety who has executed the guarantee is entitled to be wholly discharged from liability and to have the instrument delivered up to be cancelled (*d*). This relief is assigned by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34, to the *Chancery Division* of the High Court. If, however, the surety is made defendant in the Q. B. D., he may nevertheless, by way of *defence*, rely on the equity to have the guarantee set aside and cancelled, and such Division may give effect to the equity in question, so far as is incidental to the purposes of the defence (*e*). The county courts, moreover, though they have no original jurisdiction with regard to the cancellation of instruments, may also, it seems, for the purposes of a particular action, give effect to an equitable defence by a surety asking for the reform or cancellation of a guarantee on equitable grounds (*f*). Where the surety, instead of waiting until an action is brought against him on his guarantee, wishes to have it cancelled on the ground that it is void *ab initio*, he may commence proceedings in the Chancery Division of the High Court for that purpose, and where, by the construction of the terms of a guarantee, there is no right of contribution amongst the sureties, any one of them may do so without making his co-sureties parties (*g*).

(*d*) *Evans v. Bremridge*, 25 L. J. Ch. 102; and see *Rice v. Gordon*, 11 Beav. 265; *Underhill v. Horwood*, 10 Ves. 209; *aliter*, where the surety did not so become on the faith of another joining as co-surety: *Ward v. National Bank of New Zealand*, 8 App. Cas. 755.

(*e*) *Mostyn v. West Mostyn Coal and Iron Co., Limited*, 1 C. P. D. 145; followed in *Breslauer v. Barwick*, 24 W. R. 901; *Storey v. Waddle*, 4 Q. B. D. 289 C. A.; *Gathercole v. Smith*, 7 Q. B. D. 626 C. A.; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2).

(*f*) *Breslauer v. Barwick*, *supra*, and see Yearly County Court Practice, p. 28 *et seq.*

(*g*) *Pendlebury v. Walker*, 4 Y. & C. 424.

Revocation of contract of suretyship. Two modes of revocation.

II. The surety may be discharged by a revocation of the contract of suretyship.

A revocation of the contract made arises either (1), by act of the parties, or (2), by death of the surety. Let us consider these two modes of revocation separately.

Revocation by act of the parties.

(1.) The most frequent cases in which a rescission of a contract of suretyship is made by act of the parties are, where (A) the surety revokes the guarantee; or (B) a new agreement is substituted for it by mutual consent.

Where notice of revocation given by the surety to the creditor.

(A.) *The surety may sometimes be discharged by notice of revocation of the guarantee given by the surety to the creditor.*

Where guarantee is silent on the subject, power of revocation depends on nature of guarantee.

We have already seen (a), that a mere offer to guarantee may be revoked, by notice, at any time before it is expressly or impliedly accepted. Whenever it is *expressly* provided in the contract of guarantee that it shall be determinable, on notice, by the surety, it is, of course, revocable in the way thus specified (b). It is, however, rather doubtful whether, in the absence of express stipulation to that effect, a guarantee may be revoked by the surety after it has been *even partially* acted upon. But it would seem that the power of revocation depends upon whether the consideration for the guarantee is given once for all, or whether the consideration be made up of separate advances of money or goods. In the former case, it has been decided that the guarantee cannot be determined either by the surety or his representatives (c); but *seem* that, in the latter case, the guarantee is revocable by notice so as to relieve the surety from subsequent liability in

(a) *Ante*, p. 4; *Offord v Davies*, 12 C. B. (N.S.) 748.

(b) *Solvency Mutual Guarantee Company v. Froame*, 7 H. & N. 5. And see also *Boyd v. Robins*, 4 C. B. (N.S.) 749.

(c) *Lloyds v. Harper*, 16 Ch. D. 290; 50 L. J. Ch. 140; 43 L. T. 481 29 W. R. 452; *Calvert v. Gordon*, 3 Mann. & Ry. 124.

respect of any future advances made or further goods sold (*d*).

At one time it *seems* to have been thought that under no circumstances could a guarantee under seal be revoked (*e*). However, in the case of *Burgess v. Eve* (*f*), *Malins*, V.-C., expressed the opinion that, though in the case of a guarantee under seal for the good behaviour of another in an office or employment a surety might not arbitrarily and without the fullest justification withdraw that which he deliberately entered into; yet, as soon as the employed was guilty of an act which in the eye of a court of equity (*g*) is a dishonest act, the right of the surety to withdraw his guarantee attached. But it would seem that in this case the surety would not have been at liberty to withdraw his guarantee but for the misconduct of the person employed, rendering it inequitable to hold the surety liable in the future (*h*). For the liability under the guarantee would have continued so long as the person for whom it was given retained the *status* which he acquired on the faith of it.

Formerly considered that guarantee under seal could not be revoked. Contrary opinion expressed in *Burgess v. Eve*.
Guarantee for person employed cannot, as a rule, be revoked so long as he retains the *status* which he acquired on the faith of it.

(B.) *The surety may be discharged by substitution of a new contract before breach of the old one.*

Where a new agreement is substituted for original one before breach of latter.

The *substitution* of a new agreement for the former one, before any breach of the first, discharges the surety from all liability under the first. This was decided in *Taylor v. Hilary* (*i*). There the declaration stated that the defendant guaranteed the plaintiff in supplying goods to one H. H. The plea was, that before breach

Taylor v. Hilary.

(*d*) *Lloyds v. Harper*, *ubi supra*; *Bastow v. Bennett*, 3 Camp. 220.

(*e*) *Per* Lord ELLENBOROUGH, C. J., in *Hassell v. Long*, 2 M. & S. 363, 370, 371; *Gordon v. Calvert*, 2 Sim. 253. But see *Hough v. Warr*, 1 C. & P. 151; *Shepherd v. Beecher*, 2 P. W. 287.

(*f*) L. R. 13 Eq. 450.

(*g*) See also *Hough v. Warr*, 1 C. & P. 151.

(*h*) *Per* FRY, J., in *Lloyds v. Harper*, 16 Ch. D. at p. 307; 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452.

(*i*) 1 C. M. & R. 741.

of the agreement declared on, it was agreed between the plaintiff and the defendant that the plaintiff should supply goods to H. H., and that they should be paid for at the end of three months by a bill at four months, to be accepted by the defendant, which agreement the plaintiff, before breach, accepted in discharge of the former agreement and released the defendant from the performance thereof. It was held that the plea was good, and that the second agreement was a defence to the action, as being a substituted contract. "For," said the court, "before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part, the time of payment. The latter, then, is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not, therefore, require an averment of performance."

No discharge where original contract of sureties provides that on death of one of them fresh bond shall be given.

Where a bond entered into by two sureties expressly provided that on the death of either of them a fresh bond should be given, it was held that, on such death occurring, the estate of the deceased surety remained liable to contribute towards payment of the debt guaranteed, after a fresh bond had been given by the surviving surety and a new surety (a).

At common law a specialty could not be discharged before breach by parol agreement. *Mayor of Berwick v. Oswald*.

At common law an agreement under seal could not be discharged *before* breach by parol contract, whether executory or executed, nor could performance be waived by parol (b). In the case of *The Mayor of Berwick v. Oswald* (c), the plea was held to be bad, owing to this principle not having been observed. There, to an action on a guarantee *under seal*, it was pleaded that, before breach, the plaintiffs accepted a fresh surety-bond in discharge of the deed sued on. It was held, on demurrer, that this plea was bad, as pleading accord

(a) *In re Sir J. J. Ennis, Coles v. Peyton*, (1893) 3 Ch. 238, C. A.

(b) Addison on Contracts, 9th ed. p. 157.

(c) 1 Ell. & Bl. 295.

and satisfaction to a *deed before* breach. The fresh surety-bond, it must be observed, though nearly in the same terms as the deed on which the action was brought, *did not refer to the former deed*.

In equity, however, the rule of law was disregarded, and relief was often given there upon the principle that what was agreed to be done by a binding agreement was looked upon as done (*d*).

A parol license or dispensation may now be pleaded to an action on a deed (*e*).

As to the form in which a binding substitution of one guarantee for another can be made, and whether such substitution need be in writing or not, is a somewhat doubtful point. A guarantee is, as we have seen, within s. 4 of the Statute of Frauds. It seems, however, that, like any other contract within the Statute of Frauds, it can be *wholly* waived and abandoned, before breach, by a subsequent agreement not in writing (*f*). It is clear, however, that any *alteration*, before breach, in the *terms* of an agreement which falls within the statute, must be in writing (*g*). An alteration of a guarantee, therefore, is not binding unless it be in writing. Thus, in *Emmet v. Dewhurst* (*h*), a composition was guaranteed by the defendant to all the creditors of A. B. who executed a certain release before a fixed day. The plaintiff, who was one of such creditors, alleged as a reason why he did not execute the release within the fixed time, that a *verbal* arrangement was entered into between him and the defendant's agent, the effect of

Equity always disregarded. Common law doctrine on this subject, and now parol dispensation, may be pleaded to action on a deed. Whether, in the case of contracts within s. 4 of Statute of Frauds, the substitution of one contract for another must be in writing.

(*d*) White & Tudor, L. C. Eq., 6th ed., vol. ii., pp. 1145, 1146; *Brooks v. Stuart*, 1 Beav. 512; Benjamin on Sales, 3rd ed., p. 184.

(*e*) Addison on Contracts, 9th ed. p. 158.

(*f*) Chitty on Contracts, 13th ed., p. 141. And see *per* AMPHLETT, J., in *Sanderson v. Graves*, L. R. 10 Ex. 234; *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Goman v. Salisbury*, Vern. 240; *Price v. Dyer*, 17 Ves. at p. 363.

(*g*) See *Noble v. Ward*, L. R. 2 Ex. 135; *Sanderson v. Graves*, *ubi supra*.

(*h*) 3 Mac. & G. 587.

which was to bind the plaintiff to accept the composition, but to allow him to postpone his execution of the release. It was not only decided that there was no evidence that the defendant's agent had authority to enter into any new agreement, but it was held, that if such authority had been proved, the agreement being within the 4th section of the Statute of Frauds, any alteration of its terms must have been evidenced by writing. It would seem, moreover, from the observations of Lord *Truro*, in his judgment in this case, that whether what passed between the plaintiff and the defendant's agent could or could not be contended to be a variation of the old agreement, *or as the formation of a new agreement*, that it ought to have been evidenced by writing.

Revocation
by death
of the surety.

(2). *The death of the surety is, in certain cases, a revocation of the guarantee (a).*

Surety's
death does
not affect his
past liability.

The death of the surety does not, of course, affect his liability in respect of *past* transactions. Whatever liability had actually attached to the surety at the time of his death may be enforced against his representatives. With respect to subsequent transactions and liabilities, whether a guarantee is revoked by the death of the surety depends, it would seem, upon the nature of the guarantee given. If it be a guarantee which the surety could himself have determined by notice (*b*), then it appears that notice of his death will operate as a revocation (*c*). But if, on the other hand, the surety

Its effect on
subsequent
transactions
depends on
nature of the
guarantee
itself.

(a) In *America* (New York State), prior to s. 758 of the Code of Civil Procedure, the doctrine was that the liability of the surety was limited to his contract, and that, upon his death, his estate was not liable at law or in equity: *Chard v. Hamilton*, 63 N. Y. S. C. R. 259, 265. That section, however, alters the law in this respect.

(b) See *ante*, p. 388.

(c) *Coulthart v. Clementson*, 5 Q. B. D. 42; *Harris v. Fawcett*, 8 Ch. App. 866. See also *Beckett v. Addyman*, 9 Q. B. D. 783, 791; *In re Sherry, London and County Banking Co. v. Terry*, 25 Ch. D. 692, 703, 705; 53 L. J. Ch. 404; 50 L. T. 227; 32 W. R. 394.

could not himself have put an end to the guarantee by notice, then his death does not revoke the instrument, nor does it extinguish his liability thereunder (*d*). Where a joint and several continuing guarantee bond provided that the obligors, or any one or more of them, or their respective "*representatives*," might determine their or his liability by a month's notice in writing to the obligees, it was held that mere notice of the *death* of one of the obligors, given by his executor, did not determine his liability as surety, and that, notwithstanding such notice, his estate remained liable for indebtedness incurred by the principal debtors *after* his death (*e*). In cases where the guarantee is determinable by notice of the death, and no such notice is given by the surety's executor, the right of the creditor to the benefit of the guarantee in respect of advances made or liabilities incurred subsequent to the death, would, according to *Harris v. Fawcett* (*f*), and *Coulthart v. Clementson* (*g*), appear to depend upon the creditor's actual or constructive knowledge of such death having taken place, and of its being the plain duty of the executor to have given that notice. *Romer, J.*, however, dissented from this view in *In re Silvester—Midland Railway Co. v. Silvester* (*h*); "I desire to add" (he says in this case) "that I do not assent to the general proposition that where a person who is entitled to the benefits of a contract of guarantee has notice of the death of the guarantor, and that he left a will, he is, without more, affected with notice of the contents of the will, or is bound to assume that *primâ facie* it would be a breach of trust on the part of the executor not to give notice to determine the liability." Where there are

Result of
decisions on
this subject
stated.

(*d*) *Lloyds v. Harper*, 16 Ch. D. 290; 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452.

(*e*) *In re Silvester, Midland Rail. Co. v. Silvester*, (1895) 1 Ch. 573.

(*f*) 15 Eq. 311; L. R. 8 Ch. App. 866. See also *Bradbury v. Morgan*, 1 H. & C. 249.

(*g*) *Supra*.

(*h*) *Supra*.

co-sureties under a joint and several continuing guarantee, the death of one of them does not determine the future liability thereunder of the *survivors* (a), unless, *it seems*, they have given *express* notice to the creditor terminating their liability thereunder (b). It is, however, to be noticed that the mere fact of the guarantee being “a *joint* and *several*” guarantee must of itself be taken as some indication that the death of one of the co-sureties was a possible event contemplated by the parties at the time of the execution of the guarantee. But if the guarantee is “*joint*,” and not “*joint* and *several*,” this indication of intention would seem to be wanting. Where, however, three persons joined in a guarantee, which was *not* in terms several, to a bank, it was held that the death of one of the sureties did not discharge the liability of the survivors (c).

It would seem that, in the case of a guarantee of a current account at a bank, it deals only with the account between the bank and the creditor until the bank receives notice of the surety's death, so that no further dealings can take place on the faith of the guarantee after the death (d).

Discharge of
the surety by
the conduct
of the
creditor.

III. The surety may be discharged by the conduct of the creditor (e).

The instances in which the surety may be discharged by the conduct of the creditor are very numerous. For

(a) *Beckett v. Addyman*, 9 Q. B. D. 783.

(b) *Ib.* at p. 791.

(c) *Ashby v. Day*, 33 W. R. 631 ; 34 W. R. 312, C. A. ; 54 L. T. 408.

(d) *In re Sherry, London and County Banking Co. v. Terry*, 25 Ch. D. 692 ; 53 L. J. Ch. 404 ; 50 L. T. 227 ; 32 W. R. 394.

(e) The discharge of the surety by the fraud of the creditor, and by alteration of the instrument of guarantee, have already been considered in dealing with matters invalidating the guarantee *ab initio*, *ante*, pp. 364 *et seq.*, 382 *et seq.* It may be as well to mention, in this place, that as the relation of principal and surety does not exist between the transferor and transferee of shares in a joint stock company, their liability being, however, respectively primary and secondary (see *ante*,

the law favours a surety and protects him with considerable vigilance and jealousy. The conduct of the creditor which will discharge the surety, may conveniently be considered under the following heads:—

- (A.) Where the creditor varies the terms of the original contract between himself and the principal debtor, or of the contract between himself and the surety (*infra*);
- (B.) Where the creditor takes a new security from the principal debtor in lieu of the original one (p. 409);
- (C.) Where the creditor discharges the principal debtor (p. 410);
- (D.) Where the creditor discharges a co-surety (p. 420);
- (E.) Where the creditor gives time to the principal debtor (p. 422);
- (F.) Where the creditor agrees with the principal to give time to the surety (p. 437);
- (G.) Where loss occurs through the negligence of the creditor (p. 438).

All these several modes in which an implied discharge is given to the surety call for separate notice and discussion.

- (A.) *The surety may be discharged by a variation by the creditor either of the terms of the contract between the creditor and the principal debtor, or of the terms of the contract originally made between the creditor and the surety.*

Variation by creditor of terms of contract between himself and principal or of the contract between himself and the surety.

A variation of the terms of the original contract made between the principal debtor and the creditor will, generally speaking, discharge the surety. And this is the case, whether such variation be, *first*, of the original agreement between the principal debtor and the creditor; or, *secondly*, of the original agreement

p. 202, note (g)), the transferor is *not* discharged by a compromise made by the liquidators with transferees, though there is no reservation of rights against other contributories: *Helbert v. Banner, In re Barned's Bank*, L. R. 5 H. L. 28; *Roberts v. Crowe*, L. R. 7 C. P. 629; *Nevill's case*, 6 Ch. App. 43; *Hudson's case*, L. R. 12 Eq. 1.

between the surety and the creditor. It will, however, be more convenient to consider these modes of making the variations separately. Let us *first* deal with the case of a variation being made of the original agreement between the creditor and the principal debtor. There are two states of facts under which a surety is discharged by a variation of the contract between the principal debtor and the creditor. For, firstly, any *material* variation of the terms of the contract between the creditor and the principal debtor will always discharge the surety; and secondly, a variation of those terms which is *not* material, will also discharge the surety if it clearly appears that he became surety on the faith of the original contract, or if he has made these terms part of his own contract. And if notice were given to the surety of the terms of the contract between the creditor and the principal debtor, and after such notice he executed the guarantee, he is held to have become surety on the *faith* of the original agreement (*a*). And where the surety has made the terms of the original contract between the creditor and the principal debtor part of his own contract, any variation will discharge the surety, because it amounts to a breach of the creditor's contract with the surety, and not merely to a breach of the creditor's contract with the principal debtor. Whether, however, the position of the surety *has* been altered is a question of fact, and not of law, though there may be facts which would make it obviously impossible not to say that in law there is an alteration of the position of the surety (*b*).

Let us consider, in order, both these states of facts under which the surety is discharged. Firstly, as to a material variation of the terms of the contract between the creditor and the principal debtor. A good instance

(a) *Sanderson v. Aston*, L. R. 8 Exch. 73, 76.

(b) *Per* BOWEN, L.J., in *Mayor, &c., of Kingston-upon-Hull v. Harding*, (1892) 2 Q. B. at p. 506.

Variation
of contract
between
creditor and
principal.

Effect of
material
variation of
such
contract.

of the surety being discharged by a material variation of the terms between the creditor and the principal is furnished by the case of *The General Steam Navigation Co. v. Rolt* (c). In that case A. contracted with B. to build for him (A.) a ship for a given sum, to be paid by instalments as the work reached certain stages; and C. became surety for the due performance of the contract on the part of B., the builder. A. allowed B. to anticipate the greater portion of the last two instalments. It was held that C. (the surety) was discharged, as A., by allowing B. to anticipate the instalments, had materially altered the terms of the contract with B., the principal.

Another and very similar instance of the discharge of the surety by a material variation as between the creditor and the principal of the original contract, occurred in the case of *Calvert v. The London Docks Co.* (d). There a contractor undertook to perform certain works upon the terms that three-fourths of the work as finished should be paid for every three months, and the remaining one-fourth on the completion of the whole work. Payments, *exceeding* three-fourths of the price of the work done, having, without the consent of the sureties for the due performance of the work, been made to the contractor before the completion of the contract, it was held that such sureties were discharged. Where, however, retention moneys under a works contract were paid over to the contractor upon a final certificate granted by the plaintiff's engineer in respect of defective work *fraudulently* concealed from him, it was held that the defendants, who, as sureties for the contractors, had guaranteed that the contract should be "well and truly executed," were not discharged (e). For a surety for a contractor is not relieved from

*General
Steam
Navigation
Co. v. Rolt.*

*Calvert v.
London
Docks Co.*

(c) 6 C. B. (N.S.) 550.

(d) 2 Keen, 638. See also *Warre v. Calvert*, 7 Ad. & E. 143.

(e) *Mayor, &c., of Kingston-upon-Hull v. Harding*, (1892) 2 Q. B. 494, C. A.

liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer (*a*). Moreover, although the contract, for the due performance of which a guarantee has been given, gives the employers a right of superintending the works, the mere non-exercise of the right will not discharge the sureties (*a*).

Where surety bond is conditioned for payment by defendant of a sum to be awarded by court, surety discharged if award be by consent of plaintiff and defendant, though embodied in a judgment.

Where, as a condition for leave to defend under Order XIV. of the R. S. C., a surety bond was entered into, conditioned to be void if the defendant should pay such a sum (not exceeding a specified amount) as the court should think fit to award, and at the trial, instead of a judgment *in invitum* being delivered, after some inquiry into the facts, a judgment *by consent* (embodying a compromise impairing the surety's position) was given, without the surety's consent, it was held that he (the surety) was discharged (*b*).

In order to have the effect of discharging the surety, however, the variation made must clearly appear to be a *material* one. Whether or not a variation be material is a matter depending almost entirely on the peculiar circumstances of each case. An instance of a variation being held to be not a material one, and therefore not to discharge the surety, occurred in the case of *Stewart v. M'Kean* (*c*). There the defendant executed the following guarantee, addressed to the plaintiffs:—

“Gentlemen,—I hereby agree to guarantee my brother, Mr. *W. M'Kean's* intromission (*d*), as your agent in Leith, to the extent of 5,000*l.* sterling; and I am, etc.,

“*H. M'Kean.*”

(*a*) *Mayor, &c. of Kingston-upon-Hull v. Harding, supra.*

(*b*) *Tatum v. Evans and Others*, 54 L. T. 336.

(*c*) 10 Exch. 675.

(*d*) The word “intromission” is a term partly legal and partly mercantile, and signifies dealings with stock, goods and cash of a

Stewart v. M'Kean.

Soon after the commencement of the agency it was agreed between the plaintiffs and *W. M'Kean*, that the latter should furnish to the plaintiffs every six months an account current of the stock sent by them and of cash received by him from customers. The practice continued for about a year and a half, when a new agreement was entered into between the plaintiffs and *W. M'Kean*, *without the defendant's knowledge or consent*. This new arrangement was to the effect that *W. M'Kean* should, from time to time, make his promissory notes payable four months after date in favour of the plaintiffs, and that he should send them to the plaintiffs at the rate of about one note per month; and that, on the notes becoming due, *W. M'Kean* should transmit to the plaintiffs an account of all the debts or sums he had collected from their customers, and that the plaintiffs should send him such an amount of cash as would, when added to the money already in his hands, enable him to take up the notes. This agreement was immediately acted upon, and was continued to be acted upon by the plaintiffs and *W. M'Kean*, until the termination of his employment as their agent. The practical effect of this agreement was to cause *W. M'Kean* to pay over the moneys collected by him more promptly to the plaintiffs than he would otherwise have done. When *W. M'Kean* ceased to be in the employment of the plaintiffs, it was found that he had received certain moneys for the plaintiffs for which he did not and could not account. In an action upon the above guarantee, it was held, *per Parke, B., Alderson, B., and Martin, B. (Pollock, C.B., dissentiente)*, that, inasmuch as the guarantee left the mode of accounting open to the will of the employers (the plaintiffs) provided they adopted a reasonable one, the agreement between the plaintiffs and their agent, *W. M'Kean*, as to the mode of

principal coming into the hands of his agent, and to be accounted for by the agent to his principal.

accounting by means of promissory notes, as above mentioned, did not discharge the surety from his liability upon the guarantee.

*Sanderson v.
Aston.*

The case of *Sanderson v. Aston* (a) is another instance of a variation being held to be not a material one. In that case the declaration was on a bond given to the plaintiff by the defendant. The bond thus declared on recited that by an agreement of even date the plaintiff had agreed to admit J. into his service as "clerk and traveller" (not further stating the terms of the agreement), and was conditioned for J's accounting for and paying over to the plaintiff all moneys which he might receive on the plaintiff's account. The breach alleged was that J. had received moneys for the plaintiff, which he had not accounted for or paid over. Among other pleas the defendant pleaded, on equitable grounds, that the original agreement between the plaintiff and J. was, that such agreement should be terminable by one month's notice, and that the plaintiff and J. afterwards, and before the defaults sued for, made it terminable by three months' notice, without the defendant's consent. It was held (*Martin, B., dubitante*), that this plea was bad, on the ground that it did not show that the term as to the period of notice was made part of the defendant's contract, and that the alteration alleged *did not in fact materially add to the defendant's risk* (b).

In *Stewart and Macdonald v. Young* (c), a guarantee limited as to amount was given for the due and regular

(a) L. R. 8 Exch. 73.

(b) KELLY, C.B., in his judgment in this case, says: "The authorities cited go to show that we are to look at the terms of the surety's engagement, not at the terms of any agreement between the employer and employed, unless these terms are made part of the surety's agreement, or unless something has been done which, with reference to those terms, substantially alters his position."

(c) 38 Sol. J. 385.

payment of goods to be supplied by plaintiffs to a trader. Subsequently it was agreed, between the plaintiffs and the trader, that the latter should purchase all the goods he required for his business from the plaintiffs, or in default, pay them $7\frac{1}{2}$ per cent. commission on all goods he might purchase elsewhere. The surety, when sued on his guarantee, contended that he was discharged by the subsequent agreement, as it was not disclosed to him, and as it prevented the trader from carrying on his business in the ordinary way and to the best advantage. It was held that as there was nothing in the guarantee to show that the plaintiffs and trader were to be confined to ordinary business transactions, the surety remained liable notwithstanding the new agreement.

A surety for the servant of a corporation is not, it would *seem*, necessarily discharged because the bye-laws of the corporation requiring accounts or statements from the servant, at stated periods, or providing that his accounts shall be periodically examined by other officers of the corporation, have not been complied with (*d*). Such bye-laws, *semble*, are no part of the contract with the surety of the servant.

Surety for servant of a corporation, *semble*, not discharged by non-compliance of latter with bye-laws as to examination of servants' accounts.

Where the defendants agreed to indemnify the plaintiff against all liability which he might incur in giving a certain bond to the Treasury, and the plaintiff afterwards, in pursuance of a statute passed after the giving of the indemnity, made a payment to the Board of Trade, to obtain the cancelling of the said bond, it was held, that the defendants' liability as surety had not been altered by such payment, which was covered

Indemnifier not discharged by payment made under a subsequent statute to procure cancelling of bond entered into at indemnifier's request.

(*d*) See *American cases*, *State v. Atherton*, 40 Mo. 209; *Morris Canal and Banking Co. v. Van Vorst*, 1 Zab. (N.J.) 100; *Albany Dutch Church v. Vedder*, 14 Wend. 166; *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Louisiana State Bank v. Ledoux*, 3 La. An. 674; *Price v. Kirkham*, 3 H. & C. 437.

by the indemnity, and that the defendants were liable for it to the plaintiff (a).

Material variation of contract between creditor and principal does not discharge surety if made with his consent.

Moreover, even though a material variation be made by the principal debtor and the creditor in the terms of their original contract, or if the creditor so deals with his principal debtor, as to alter the position of the surety, still the surety is not discharged, if the transaction was with his concurrence (b). But if a surety becomes aware that the creditor is going to give time, or do something else, which, if done without his assent, may discharge him, he is not, it seems, bound to warn the creditor against doing the act (c).

Variation though not material will do so if original contract made part of that subsisting between creditor and principal.

Secondly, as to the discharge of the surety by a variation which is not in itself material, where the surety has contracted on the faith of the original contract, or has expressly made the terms of it part of his own contract.

Surety discharged if he contracted on faith of original agreement.

The surety is held to have become surety *on the faith* of the original agreement, if notice was given to him of the terms of the contract between the creditor and the principal debtor, and *after such notice* he executed the guarantee (d).

Or where surety has made the original contract part of his own contract.

Where, too, the surety has made the terms of the original contract between the creditor and the principal debtor part of his own contract, *any* variation will discharge the surety, because it amounts to a breach of the creditor's contract *with the surety*, and not merely to a breach of the creditor's contract with the principal debtor.

Glyn v. Hertel.

Such a case is that of *Glyn v. Hertel* (e). There the defendant, in consideration that the plaintiffs would

(a) *Webster v. Petre*, 4 Ex. D. 127.

(b) *Woodcock v. Oxford and Worcester Banking Co.*, 1 Drew. 521. See also *Oakford v. European Shipping Co.*, 1 H. & M. 182; *Swire v. Redman*, 1 Q. B. D. 536; 35 L. T. 470; 24 W. R. 1069.

(c) *Per* BLACKBURN, J., in *Polak v. Everett*, 1 Q. B. D. 673.

(d) *Sanderson v. Aston*, L. R. 8 Exch. 73, 76.

(e) 8 Taunt. 208.

lend to S. & Co. 5,000*l.*, promised to be answerable for the same. At the time the guarantee was given S. & Co. were indebted to the plaintiffs in a considerable sum of money, for which the plaintiffs held a promissory note, drawn by S. & Co., and other bills as security. On receiving the guarantee the plaintiffs cancelled the note and delivered up the bills which they held. S. & Co. then delivered those bills back again to the plaintiffs, together with a new promissory note, but no money passed. It was held that the transaction did not amount to a loan of money, so as to charge the defendant.

The same strict doctrine was also applied in *Garrett v. Handley* (*f*). *Garrett v. Handley.* There it was held that if a defendant guarantee payment of money to be advanced to B. by the plaintiff, and the plaintiff instead of advancing the money himself get another to do so, who debits B. in his books, the defendant is not liable to the plaintiff on the guarantee.

The recent case of *Holme v. Brunskill* (*g*) well *Holme v. Brunskill.* exemplifies the doctrine under consideration. There the defendant gave a bond to secure to the plaintiff the re-delivery to him at the end of the tenancy of a flock of sheep in good order and condition, which, together with a farm and certain hill pastures, had been let to one G. B. Subsequently, without the assent of the surety, a variation took place in the terms of the letting, by virtue of which a field was surrendered to the plaintiff and the rent reduced. On giving up the farm by G. B. it was ascertained that the flock was reduced in number and deteriorated in quality and value. The plaintiff accordingly sued the defendant on his bond. It was held by the court (*Cotton and Thesiger*, L.JJ., *Brett*, L.J., *diss.*) that the contract of the surety was that the flock should

(*f*) 4 B. & C. 664.

(*g*) 3 Q. B. D. 495 ; and see *Baynton v. Morgan*, 21 Q. B. D. 101.

be delivered up in good condition, together with the farm, as originally demised to the tenant; that the surety ought to have been asked to decide whether he would assent to the variation in the terms of the letting, and that, not having been asked to assent, he was discharged from liability. It was also held, that at the trial the judge ought *not* to have left it to the jury to say whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties as regards the tenant's capacity to fulfil the condition of the bond, as the surety was the sole judge whether it was reasonable that he should remain liable notwithstanding the new agreement (a). In *Polak v. Everett* (b), the facts were as follows: N. was indebted to the plaintiffs, and by deed agreed (*inter alia*) to transfer to them shares of the nominal value of 6,000*l.* in a company to which he was about to assign his business, and to redeem them at par within a specified time. It was also agreed between them that the book debts, to the nominal amount of 8,000*l.*, due to N., should be collected, and one-half paid to the plaintiffs, to be applied towards redemption of the shares, and when they had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by them, so far as concerned the redemption of the shares of the value of 6,000*l.* Subsequently, an arrangement was made between the plaintiffs and N. by which, for an equivalent in shares and cash, they released to him their interest in the book debts, that he might dispose of them to the company. The defendant having been sued on his guarantee for a

*Polak v.
Everett.*

(a) And see *per* BOWEN, L.J., in *Mayor, &c., of Kingston-upon-Hull v. Harding*, (1892) 2 Q. B. at p. 506.

(b) 1 Q. B. D. 669.

deficiency of 2,500*l.* in the amount of shares, it was held that the new arrangement was such a variation of the original agreement as to discharge the surety.

Where a person enters into a bond as surety for the performance by another of *two* things, which are separate and distinct, a subsequent alteration of the principal's contract as to *one* of them, without the surety's consent, does not release the surety from his contract of suretyship as to the other (c).

Surety for performance of two distinct things not discharged *in toto* by alteration of original contract as to one of them.

Secondly, let us next deal with the case of the variation of the terms of the agreement originally made between the creditor and the surety.

Variation of contract between creditor and surety.

As a general rule, any variation of the terms originally made between the creditor and the surety discharges the surety. Thus, for instance, in *Bacon v. Chesney* (d), it was held that if A. engages to guarantee the amount of goods supplied by B. to C., provided *eighteen* months' credit be given, and B. gives credit for *twelve* months only, he is not entitled, after the expiration of six months more, to call upon A. on his guarantee. Lord *Ellenborough*, in this case, said: "The claim as against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the guarantee have been strictly complied with." And so, again, where the bond by a surety purported to guarantee the payment of flour (of a specified quality), to be supplied by the obligee in order to enable the principal debtor to execute a contract, and the obligee designedly supplied inferior flour so that the contract was annulled, it was held, that the obligor was, in equity, entitled to have the bond cancelled (e).

Surety is usually discharged by any variation. *Bacon v. Chesney*.

(c) *Harrison v. Seymour*, L. R. 1 C. P. 518. And see *Croydon Commercial Gas Co. v. Dickinson*, 2 C. P. D. 46; 46 L. J. C. P. 157; 36 L. T. 135; 25 W. R. 157.

(d) 1 Stark. 192.

(e) *Blest v. Brown*, 3 Giff. 450; 8 Jur. (N.S.) 187; 10 W. R. 569.

So, too, where defendant guaranteed the payment of gold with which the plaintiff should supply a goldsmith for the purposes of his trade, and the plaintiff discounted bills for the goldsmith and gave him for them partly gold and partly money; and the gold was applied to the goldsmith's trade, but the goldsmith did not indorse the bills; it was held, that the defendant was not liable under his guarantee for the gold so furnished (a). To a similar effect also is the well-known case of *Whitcher v. Hall* (b). There a contract was made between A., B., and C., whereby A. agreed to let and B. agreed to take the milking of thirty cows at 7*l.* 10*s.* per annum, from February 14th, the rent to be paid quarterly in advance, and C. agreed to pay or cause to be paid the said rent. It was laid down by the court that in such a contract C. was a mere surety, and that in an action against him for the rent, A. was bound to prove a *literal* performance of the contract on his part, and that any variation made in such a contract by A. and B., without the consent of C., discharges the latter, though his risk is not thereby increased. And it was further held in this case, that though it appeared that the alteration as to the mode of using the cows made no substantial difference as to profit or loss, the surety was discharged.

Whitcher v. Hall.

Surety for moneys to be received by another not liable unless the money is actually received.

Upon the like principles, also, in *Mills v. The Alderbury Union* (c), it was decided that, where a person becomes surety for another for moneys to be received by that other, the surety cannot be made liable unless such other person individually and personally receive the money; and it has further been decided (d), that where a person is surety for

(a) *Erans v. Whyte*, 5 Bing. 485.

(b) 5 B. & C. 269; 8 Dow. & Ry. 22. See also *Wright v. Sandars*, 3 Jur. (N.S.) 504.

(c) 3 Exch. 590.

(d) *Mills v. Alderbury Union*, *supra*; *Bellairs v. Ebbsworth*, 3 Camp. 52; *London Assurance Company v. Bold*, 6 Q. B. 514.

another for the due accounting for moneys received by him, he is not liable for the non-payment of money by that person jointly with another. And, where a person became surety by a promissory note for a floating balance due to bankers from a customer, it was held that the surety was released by the bankers crediting the customer with the full amount of the note, without advancing the money at the time (e). And so, likewise, on the same strict principle, in *Philips v. Astling* (f), it was decided that, upon a contract to guarantee a bill for a given sum, the surety is not liable, even to the extent of that given sum, on a bill given for a larger sum. So, too, in *Pickles v. Thornton* (g), where the defendant in consideration that the plaintiffs would give up their lien on certain goods of Y., and would take the acceptances of Y. for 140*l.*, guaranteed to the plaintiffs payment of the same, and the plaintiffs accordingly gave up to Y. the said goods and took acceptances of Y. for 145*l.*, namely, one acceptance for the sum of 105*l.* and one acceptance for the sum of 40*l.*, it was held that the defendant was not liable even to the extent of 140*l.*

When surety stipulates for advance to third person, giving latter credit for a promissory note is no performance.

Surety for bill for a given sum not liable even to that extent if bill given for larger sum.

Pickles v. Thornton.

Again, where a surety has guaranteed the payment by the principal debtor "of two bills you intend to renew for him," he (the surety) is not liable under this guarantee unless the bills renewed are between the same parties, for the same amount, for the same period as, and commence from the date of expiration of, the original bills (h). So, too, where a surety has agreed to repay whatever the creditor is made to pay under a policy, he cannot be rendered liable for sums paid

Or, in respect of renewed bills unless they correspond with the originals.

(e) *Archer v. Hudson*, 7 Beav. 551.

(f) 2 Taunt. 206.

(g) 33 L. T. R. 658, C. A. See also *Clarke v. Green*, 3 Ex. 619.

(h) *Barber v. Mackrell*, 40 W. R. 618; 67 L. T. 108. As to meaning of term "renewal" see *Rickards v. Rickards*, 2 Y. & C. Ch. Cas. at p. 427.

under a scheme of arrangement substituted for the policy (a).

Surety not discharged where no real variation of the contract.

Where, however, though there be an *apparent* variation there is *really* no variation of the terms of the original agreement, the surety will not be discharged. Thus, in *Davey v. Phelps* (b), the facts were as follows:—A surety gave a bond conditioned for the due payment by M. of all sums in which M. should, from time to time, become indebted to the plaintiffs for goods supplied to him by them in the course of their business. The plaintiffs, having drawn a bill upon M. for coals supplied to him, discounted the bill, which was dishonoured. M. went to the plaintiffs, and telling them that he wanted 80*l.* to enable him to take up the bill, asked them to *lend* him that sum. The plaintiffs thereupon gave him a cheque for 80*l.*, with which, and his own money, he took up the bill. It was held, that this was not in substance a loan by the plaintiffs to M. of the 80*l.*, but an advance by them for the specific purpose of taking up the bill, which, as between the plaintiffs and M., remained unpaid to that extent; and that, consequently, as the plaintiffs might have recovered the 80*l.* from M. as for goods sold, the defendant was liable to pay that sum.

In *Taylor v. Bank of New South Wales* (c) the facts were as follows:—The appellants, having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, claimed to be released wholly or *pro tanto* from liability on the ground that the creditor had, without notice to them, sold part of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and that inasmuch as the purchaser had failed to pay the price, they had been

(a) *Mortgage Insurance Corporation v. Pound*, 64 L. J. Q. B. 394, C. A.

(b) 2 M. & Gr. 300.

(c) 11 App. Cas. 596.

deprived of the benefit of a security upon which they were entitled to rely for protection. It was held that on the evidence the sale was effected by the mortgagor, although with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, and that the liability of the sureties was not affected thereby. *Price v. Kirkham* (d) likewise belongs to the class of cases under consideration. There, certain persons were sureties for the repayment, by weekly instalments, of money borrowed by P. of a loan society. One of the rules of the society provided "that if any member becomes more than four weeks' payment in arrear, the committee immediately inform the sureties of the same and have power to institute legal proceedings against them." P. died, being *more than four weeks' payment in arrear*, but no application was made to his sureties until two years afterwards. It was held that the sureties were liable, as the rule in question was a mere statement of the duty of the committee and was not obligatory on them as between the society and the sureties.

(B.) *The surety may be discharged by the creditor taking a new security from the principal debtor in lieu of original security.*

Discharge of surety by creditor taking additional security from principal debtor in lieu of original security.

A creditor discharges the surety if he take a further security in lieu of the original security; or if he take a further security of such a kind and given under such circumstances as to operate as a merger of the original security (e). So if the arrangement between the creditor and the principal debtor amounts to a *substitution of security for personal liability*, the surety is discharged (f).

(d) 3 H. & C. 437.

(e) *Clarke v. Henty*, 3 You. & Coll. Exch. Cas. 187; *Boaler v. Mayor*, 19 C. B. (N.S.) 76.

(f) *Lowes v. Maughan and Fearon*, 1 C. & Ellis, 340.

However, a creditor, by taking additional or further security from the principal debtor, does not discharge the surety, *unless* he took it in lieu of the original security (a), or unless the additional security operate as a merger of the original security (b).

Whether a security was taken in lieu of original security is mainly question of fact.

Whether or not a security was taken in lieu of a prior one, is, to a great extent, a question of fact. However, where a security was originally given by bond, it was held that it was not released by the creditor subsequently taking from the principal debtor a promissory note for the amount due, subject to a general understanding, though not in writing, that the giving of the note was not to affect the bond (c). And, upon somewhat similar principles, it was decided in *Collins v. Owen* (d), that a bill for the amount of a guarantee, given by the principal debtor and taken by the plaintiff before the expiration of the time mentioned in the guarantee, but afterwards destroyed in the surety's presence, is no waiver of the guarantee.

Whether the original security merges in subsequent one is a question of law.

Whether or not a further security is a *merger* of one previously taken is, to a great extent, purely a matter of law. It would *seem* that there is no merger if it be expressly stipulated that the additional security shall be collateral only (e). And, at all events, it is quite clear that a security not under seal is not merged in a specialty security, unless the latter be as extensive as the former and between the same parties (f).

Discharge of surety by discharge of principal debtor.

(C.) *The surety is discharged if the creditor voluntarily discharge the principal debtor without reserve of remedies against the surety.*

Whatever has the effect of discharging the *principal*

(a) See *Clarke v. Henty*, *ubi supra*; *Gordon v. Calvert*, 4 Russ. 581; *Eyre v. Everett*, 2 Russ. 381; *Twopenny v. Young*, 3 B. & C. 208, 210.

(b) *Boaler v. Mayor*, 19 C. B. (N.S.) 76.

(c) *Wyke v. Rogers*, 1 De G. M. & G. 408. (d) 15 L. T. (N.S.) 327.

(e) *Per KEATING, J.*, in *Boaler v. Mayor*, 19 C. B. (N.S.) 76.

(f) *Boaler v. Mayor*, *supra*.

debtor, will generally discharge the surety also. In such a case the discharge of the principal is an *implied* discharge of the surety (*g*). Thus, where there is an absolute release of the principal debtor, the remedy against the surety is gone, because the debt is extinguished (*h*). Moreover, it would be a fraud upon the principal debtor to profess to release him and then to sue the surety who in turn might sue him (*i*). A curious example of the doctrine under consideration is furnished by the recent case of *Hewison v. Ricketts* (*k*). There the defendant had guaranteed the payment by G. of instalments under a hire and purchase agreement. Default having been made by G. the plaintiffs, before having recourse to the surety under his guarantee, seized the goods and thereby determined the hire and purchase agreement. It was held that, under these circumstances, the surety was discharged. Again, apart from the Bankruptcy Acts, if a deed of composition with the principal debtor be *voluntarily* executed by the creditor, the surety will be discharged (*l*). Unless the guarantee provides that composition with the principal shall not, *ipso facto*, release the surety (*m*); or the composition deed itself contain a reservation of remedies against the surety (*n*). Voluntary execution by creditor of a deed of composition.

(*g*) See *Burke's case*, cited 2 B. & P. 62; cited 6 Ves. 809; and also cited 18 Ves. 20; and see *Lowes v. Maughan and Fearon*, 1 C. & Ellis, 340.

(*h*) *Commercial Bank of Tasmania v. Jones*, (1893) A. C. 313.

(*i*) Per MELLISH, L.J., in *Nevill's case*, L. R. 6 Ch. App. at p. 47.

(*k*) 63 L. J. Q. B. 711. (*l*) *Ex parte Glendinning*, Buck, 517, 520.

(*m*) *Cowper v. Smith*, 4 M. & W. 519; *Kearsley v. Cole*, 16 M. & W. 128; and see *Metropolitan Bank of England and Wales v. Coppee*, 12 T. L. R. 129, 258, where it was held that the withdrawal of an execution upon a judgment obtained against the principal debtor was "compounding" within the meaning of a guarantee, which provided that surety was not to be released thereby.

(*n*) *Kearsley v. Cole*, *ubi supra*; *Keyles v. Elkins*, 5 B. & S. 240; *Bateson v. Gosling*, L. R. 7 C. P. 9; *Davidson v. M'Gregor*, 8 M. & W. 755; *Boulbee v. Stubbs*, 18 Ves. 20, 22; *Ex parte Carstairs*, Buck, 560; *Ex parte Glendinning*, *supra*.

Voluntary deed releasing debtor as if discharged in bankruptcy will determine surety's liability.

Effect of execution by creditor, as trustee thereof, of deed of assignment releasing principal debtor.

Effect of a composition deed under Bankruptcy Act, 1861, on surety's liability.

Effect on surety's

Thus, where the obligee of a surety bond, without the consent of the surety, executed a deed whereby the principal debtor was released from his debts "*in like manner as if he had obtained his discharge in bankruptcy*," it was held that although if the debtor had obtained his discharge in bankruptcy, the surety's liability would have continued, yet, as the release by the obligee was *his own act*, the surety was discharged (a). So where one of several persons, to whom the defendant had given a guarantee, subsequently executed a deed of assignment of the debtor's property, *in the capacity of trustee under such deed*, it was held, that as such deed operated as an extinguishment of the debtor's liability, the defendant, as surety for the debtor, was thereby *entirely* released from liability under the guarantee (b).

Where a composition deed, under the Bankruptcy Act, 1861 (c), was executed by the creditor with the principal debtor, the surety was held to be discharged thereby, unless it *expressly* reserved the rights of the sureties against the principal debtor (d). And, in such a case, it was held that the *implied* reservations contained in a reserve of the rights of the creditors against the sureties was not sufficient (e). On the other hand it was also held that a deed under the same statute was valid, although not containing any clause reserving rights against sureties, unless it was shown that there were sureties, a creditor's rights against whom would be affected by its absence (f).

Although, generally speaking, as has been already

(a) *Cragoe v. Jones*, L. R. 8 Ex. 81.

(b) *Teede v. Johnson*, 11 Ex. 840.

(c) 24 & 25 Vict. c. 134.

(d) *Hooper v. Marshall*, L. R. 5 C. P. 4.

(e) *Ibid.*

(f) *Johnson v. Barratt*, L. R. 1 Exch. 65; *Poole v. Willats*, 1 R. 4 Q. B. 630; 38 L. J. Q. B. 255; 20 L. T. 1006; 17 W. R. 109; 9 B. & S. 957.

stated, the discharge of the principal is the discharge of the surety, this is not the case where it is not effected by the voluntary act of the creditor, but by *operation of law*. This rule, however, admits of certain exceptions (g), and indeed, in the recent case of *Mortgage Insurance Co. v. Pound* (h), *Wright, J.*, expressly lays it down that "the general rule is that he (the surety) is released if there is any material alteration of his position made without his consent, *although made by operation of law*."

liability of
discharge of
principal by
operation of
law.

In a case decided before the Bankruptcy Act, 1883, which abolishes liquidation proceedings, it was held, that the unconditional discharge of a debtor in liquidation did not release his sureties, although they (the sureties) did not assent to, but protested against, his discharge (i); while it was also held, in a case under the Bankruptcy Act, 1869, that a resolution to accept composition from the principal debtor did not release the surety, even though expressly assented to by the creditor (k).

Cases before
Bankruptcy
Act, 1883.

Under the Bankruptcy Act, 1890, the acceptance or approval of a composition or scheme will not release any person who, at the date of the receiving order, was surety, or in the nature of surety for the debtor. For it is expressly provided by that Act that the acceptance by a creditor of a composition or scheme of arrangement shall not release any person who, under

Provisions
on subject in
Bankruptcy
Acts, 1883
and 1890.

(g) See *Pybus v. Gibbs*, 6 E. & B. 902; 26 L. J. Q. B. 41; *Finch v. Jukes*, W. N. (1877) p. 211.

(h) 64 L. J. Q. B. at p. 396.

(i) *Ellis v. Wilmot*, L. R. 10 Ex. 10; 44 L. J. Ex. 10; 31 L. T. 754; 23 W. R. 204; and see *Megrath v. Gray*, *Gray v. Megrath*, L. R. 9 C. P. 216. A surety for a bankrupt was held not to be discharged by the creditors signing the bankrupt's certificate even after notice from the surety not to do so; *Brown v. Carr*, 7 Bing. 508; see also *Langdale v. Parry*, 2 Dowl. and Ry. 337.

(k) *Ex parte Jacobs*, *In re Jacobs*, 10 Ch. App. 211; overruling *Wilson v. Lloyd*, L. R. 16 Eq. 60; *The Provincial Bank v. Cussen*, 18 L. R. Ir. 382, C. A.

the Bankruptcy Act, 1883, would not be released by an order of discharge if the debtor had been adjudged bankrupt (a). And such order of discharge does not release any person who was surety, or in the nature of surety for the bankrupt (b).

The courts have recently had to consider one or two cases in which it had to be determined whether sureties for joint stock companies are discharged by reason of the reconstruction of such companies under schemes of arrangement expressly or impliedly assented to by their creditors. It will be convenient to refer to these cases in this place. In *In re London Chartered Bank of Australia* (c) some of the customers of a banking company, who had deposited moneys with it on deposit and current accounts, contracted with an insurance company to guarantee the repayment of such moneys by the banking company. An order to wind up the banking company having been made, a statutory majority of the creditors, as an alternative mode of liquidation, agreed to a scheme of arrangement under the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), which was sanctioned by the court. It was held that, as it is by *operation of law* that such a scheme becomes effective to relieve the company and its contributories from further liability than that which is contemplated or imposed by the scheme, it is unnecessary to insert therein a reservation of the rights of sureties for the companies' debts. In *Dane v. Mortgage Insurance Corporation* (d), by an instrument purporting to be "a policy of insurance," it was witnessed that the defendants guaranteed to the "assured," the plaintiff, the payment of a sum of

(a) B. A., 1890, s. 3 (19).

(b) B. A., 1883, s. 30 (4).

(c) (1893) 3 Ch. 540; and see *In re English, Scottish, and Australian Chartered Bank*, (1893) 3 Ch. 385.

(d) (1894) 1 Q. B. 54, C. A.

Sureties for joint stock companies not discharged by the reconstruction of such companies (after default) under statutory schemes of arrangement expressly or impliedly assented to by creditors.

money deposited by her in a bank in Australia, if the bank should make default in paying the same. The bank having made default, a scheme of arrangement between the bank and its creditors, winding up the old bank and constituting a new one, and giving the creditors rights against the new bank in satisfaction of their debts, was, under the provisions of a Colonial statute, sanctioned by a meeting of creditors and by the Colonial Court. It was held that the defendants remained liable to the plaintiff under his contract, notwithstanding the scheme of arrangement, Lord *Esher*, M.R., and *Lopes*, L.J., holding that the contract was, upon its true construction, one of insurance against a certain event, viz., the bank's default, and that event having happened, the defendants were liable to pay the sum insured; while *Kay*, L.J., held that whether the contract was one of suretyship or one of insurance, the scheme of arrangement, which operated to discharge the bank under the statute and not by way of accord and satisfaction, did not defeat the right which had vested in the plaintiff under the contract upon the default made by the bank. In *Mortgage Insurance Corporation v. Pound* (e), which is in some respects akin to the last two cases, the facts were as follows:—The plaintiffs, by one of their policies, guaranteed the payment of the principal and interest at 5 per cent. secured by debentures issued by the M. Co. The defendants, four of the directors of the M. Co., agreed in writing to indemnify the plaintiffs against all sums which they should pay under their policy up to a certain amount. Default having been made by the M. Co., a scheme of arrangement was sanctioned by the court under the Joint Stock Com-

Aliter, where the scheme of arrangement alters the event upon which the liability of the surety is to arise.

(e) 64 L. J. Q. B. 394, C. A.; and see this case, *ante*, pp. 408, 413. The *ratio decidendi* of this case in the C. A. differs from that put forward by *WRIGHT*, J., in the Divisional Court.

panies Act, 1870, by which the plaintiffs were to have till 1900 to pay off the principal sums due by them, and in the meantime to pay interest at 4 per cent. The plaintiffs having made payment under this scheme of arrangement, claimed to recover from the defendants under their indemnity the amount so claimed. *Held*, that under these circumstances the defendants were no longer liable and the plaintiffs could not recover.

Where no actual legal discharge of principal debtor, surety remains liable.

Even in the case of a *voluntary* discharge of the principal debtor by the act of the creditor, in order to release the surety, there must be an *actual legal discharge* of the principal debtor, and not a mere intention or contemplation of releasing him. Consequently, where a debtor and his surety *by a fraud*, to which the debtor was a party but of which the creditor was innocent, succeeded in persuading the creditor to release the debtor, it was held, that as no consideration moved from the surety, the release was ineffectual; and it was further determined that the creditor was entitled to be restored to his rights against the surety (*a*). So where a composition deed, by which the defendant guaranteed the payment by the debtor B. of the last of three instalments, contained a clause that in "the event of B. being adjudicated bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of the deed, before full payment of the composition, the defendant should be released from his guarantee," it was held that the defendant could only be released from his guarantee by a bankruptcy of B. procured under the provisions of the deed (*b*). In this connection it may here be mentioned that it has been recently held that where, under s. 18, sub-s. (11), of the Bankruptcy Act,

(*a*) *Scholefield v. Templer*, 4 De G. & J. 429, 434; 28 L. J. Ch. 452.

(*b*) *Glegg v. Gilbey*, 2 Q. B. D. 6, 209; 46 L. J. Q. B. 325; 35 L. T. 927. And see *Hughes v. Palmer*, 19 C. B. (N.S.) 393; *Webster v. Petre*, 4 Ex. D. 127.

1883, the debtor is adjudicated a bankrupt and the composition is annulled, the surety of the latter is discharged (c).

Again, although, as a general rule, a voluntary discharge of the principal discharges the surety also, yet the surety may, by *express stipulation* in the guarantee, agree to remain liable, even after the discharge of the principal debtor. And in that case he is, of course, not discharged by the discharge of the principal (d), since there is then no ground for the presumption that the discharge of the principal was an implied discharge of the surety also (e).

Surety may expressly agree to remain liable after principal's discharge.

Again, it is clear that a mere covenant not to sue the principal debtor, qualified by a reserve of remedies against the surety, will certainly not discharge the latter (f). Language importing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor, where that intention appears, but a covenant not to sue is ineffectual if the discharge given is in reality absolute (g).

Effect on surety's liability of a covenant not to sue principal.

Upon similar principles, although an *absolute and unconditional release* of the principal debtor discharges the surety, yet where the release contains a proviso, reserving the rights of the creditor against the surety, the surety is not discharged by it (h). In such a case the instrument, by the very force of the proviso, is prevented from being a *release* and is cut down to a *covenant not to sue*.

Effect of release with reserve of remedies against surety.

(c) *Walton v. Cook*, 40 Ch. D. 325.

(d) *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 34 L. J. Ex. 133; 12 L. T. 499; 13 W. R. 922.

(e) *Burke's case*, 2 B. & P. 62; 6 Vesey, 809; 18 Vesey, 20; *Cowper v. Smith*, 4 M. & W. 519.

(f) *Price v. Barker*, 4 E. & B. 760; 24 L. J. Q. B. 130.

(g) *Commercial Bank of Tasmania v. Jones*, (1893) A. C. 313.

(h) *Maltby v. Carstairs*, 1 M. & R. 549; 7 B. & C. 735; *North v. Wakefield*, 13 Q. B. 536.

Green v.
Wynn.

In *Green v. Wynn*, (a) Lord *Hatherley* thus explains this doctrine (b): "But the authorities say that if, on the one hand, the debtor is released, and, on the other hand, all demands against other persons are reserved, then it is inconsistent with the frame and object of the deed to hold that the release is intended to be complete and absolute, as that would make the two parts of the deed utterly inconsistent. The release cannot be construed to be absolute, because then no rights would be reserved in any case, and the courts have, therefore, held that such a release is not to be construed as absolute, *but only as a covenant not to sue*. That being so, the remedy is gone as between the debtor and the creditor, inasmuch as the creditor cannot sue the debtor; but, as against all other persons, the rights of the creditor are reserved." In accordance with this doctrine, under the following circumstances, a surety was held not to be released:—A deed of arrangement under the Bankruptcy Acts, 1861 and 1869 (c), contained a release of the debtor, subject to a proviso reserving the rights of creditors holding securities. The court held that this operated as a covenant not to sue, and not as an extinguishment of the debt, so as to bar the remedy against the surety, notwithstanding the deed contained an absolute assignment of all the debtor's property and effects to the trustees, and also provisions for enabling them to carry on the trade for the benefit of the estate (d).

(a) 4 Ch. App. 204—206; 38 L. J. Ch. 220; 20 L. T. 131; 17 W. R. 385.

(b) See also *Currey v. Armitage*, cited 4 C. B. (N.S.) 221; *Bateson v. Gosling*, L. R. 7 C. P. 9; 41 L. J. C. P. 53; 25 L. T. 570; 20 W. R. 98; *Webb v. Hewitt*, 3 K. & J. 438; *Kearsley v. Cole*, 16 M. & W. 128; *Vorley v. Barrett*, 1 C. B. (N.S.) 225; 26 L. J. C. P. 1.

(c) 24 & 25 Vict. c. 134, and 32 & 33 Vict. c. 77.

(d) *Bateson v. Gosling*, L. R. 7 C. P. 9; 41 L. J. C. P. 53; 25 L. T. 570; 20 W. R. 98.

It seems, however, that as a general rule the reservation of rights against the surety, on giving the principal debtor a release, must appear *on the face* of the instrument, and that *parol* evidence of a reservation cannot be given (*e*). The general rule, however, does not appear to be without exceptions. Thus, in one case, the principal debtor executed an assignment of property for the benefit of his creditors containing a release by the creditors, but no reservation was contained of the creditor's rights against the surety. The creditor executed the deed with the privity of the surety, and on the understanding, as shown by the evidence, that his rights against the surety were not to be prejudiced thereby, and under these circumstances it was held that, even assuming that it was necessary that the reservation of remedies against the surety should appear *on the face* of the deed, at all events the omission of such express reservation did not discharge the surety, as the deed was executed with his consent (*f*).

It should also be noticed that though, as a rule, a release to the principal debtor is a release to the surety, yet a release given after the surety has made himself a principal debtor for the amount due has not this effect. This appears to be in analogy with similar cases which have been previously cited. Thus, for instance, where the surety has given a security for the debt, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety. And this is not affected by the fact that the surety has actually paid part of the debt, and the security is for the balance (*g*).

(*e*) *Cocks v. Nash*, 9 Bing. 341; *Mercantile Bank of Sydney v. Taylor*, (1893) A. C. 317; *Ex parte Glendinning*, Buck, at p. 520.

(*f*) *Ex parte Harvey*, 23 L. J. Bank. 26; *Wyke v. Rogers*, 21 L. J. Ch. 611; 1 De G. M. & G. 408; and see *Norman v. Bolt*, 1 C. and Ellis 77.

(*g*) *Hall v. Hutchons*, 3 Myl. & Kee. 426.

Effect of release of one of several joint debtors where it is alleged that the remainder are only sureties for him.

Where a bond has been given for payment of money on a certain day by A., B., and C. *jointly*, and it does not appear on the face of the bond that B. and C. are only sureties, it is no defence to an action on the bond against B. and C. *after* A.'s death, to plead that A. was the principal, and that the plaintiff had released A.'s *executor* before bringing the action (a). In this case it is to be noticed that, *before* the release, the liability, being *joint*, had *survived* to B. and C.

Effect of discharge of one of several sureties by creditor.

(D.) *The discharge by the creditor of a co-surety will sometimes discharge a surety.*

It has long been doubtful whether the simple discharge of one surety without more operates as a discharge of the other or others (b). It is submitted, that if such discharge does not amount to an actual *release*, but consists of a composition with or a giving of time to a co-surety, it has no such effect (c). Certainly, it ought *not* always to do so, since the right of contribution is not thereby necessarily destroyed (d). Where, however, such discharge has the effect of destroying the right of contribution, wholly or partially, the surety will undoubtedly be discharged altogether, or *pro tanto*, according to circumstances (e). Thus, where the creditor had effected a compromise with the trustee in bankruptcy of one of several sureties, by which he precluded himself from receiving a dividend against his estate, it was held that the co-sureties were discharged to the extent of the dividend which, but for such compromise, the creditor might have received (f). So far

(a) *Ashbee v. Pidduck*, 1 M. & W. 564.

(b) *Ex parte Gifford*, 6 Ves. 805, 807; *Thompson v. Lack*, 3 C. B. 540; *contra Evans v. Bremridge*, 2 K. & J. 174, 183; *Nicholson v. Revill*, 4 Ad. & E. 675; and see *Done v. Whalley*, 2 Ex. 198.

(c) *Per* PARKE, B., in *Kearsley v. Cole*, 16 M. & W., at p. 136.

(d) *Ex parte Gifford*, *supra*; and see the *American* cases of *Hill v. Morse*, 61 Me. 541; *Clapp v. Rice*, 15 Gray, 557.

(e) *Per* Lord ELDON, in *Mayhew v. Crickett*, 2 Swanst., at p. 192, 193.

(f) *Re Wolmershausen, Wolmershausen v. Wolmershausen*, 62 L. T. 541.

as the decisions have gone on the subject, they tend to support the view that the effect of the discharge of one of several sureties by the creditor on the liability of the rest varies according to the circumstances of each case. Thus, it has been decided that it is competent for creditors executing a deed of composition with the principal debtor, and *certain* of his *sureties*, to reserve their remedies against other sureties (*g*); and in the very singular case of a release of one co-surety, with a reserve of remedies against the other, it is settled that the surety is not discharged (*h*). Such a release would seem to operate as a covenant not to sue (*i*). In the recent case of *Ward v. National Bank of New Zealand* (*k*) it was held that where two or more sureties contract *severally*, the creditor does not break the contract with one of them by releasing the other; the contract remaining entire, the surety in order to escape from liability must show an existing right to contribution from his co-surety which has been taken away or injuriously affected by the release. Again, when one of two persons who had given a *joint* guarantee for payment of rent gave a cheque in satisfaction of his liability on the guarantee, it was held that recovery of judgment on the cheque (which judgment was *not* satisfied) did not merge the cause of action on the guarantee, and that, consequently, the other surety remained liable (*l*). It is apprehended, however, that if, in this case, the judgment had been *satisfied*, or judgment had been recovered *on the guarantee* against

Where sureties severally liable, release of one by creditor does not discharge the rest.

Unsatisfied judgment on a cheque given by one of two joint sureties no bar to action on guarantee against other one.

(*g*) *Ex parte Carstairs*, Buck, 560.

(*h*) *Thompson v. Lack*, 3 C. B. 540. See also *North v. Wakefield*, 13 Q. B. 536; *Cheetham v. Ward*, 1 B. & P. 630; *Solly v. Forbes*, 2 Br. & B. 38.

(*i*) *Willis v. De Castro*, 4 C. B. (N.S.) 216; 27 L. J. C. P. 243. And see *Ex parte Good, In re Armitage*, 5 Ch. D. 46.

(*k*) L. R. 8 App. Cas. 755; 52 L. J. P. C. 65; 49 L. T. 315.

(*l*) *Wegg-Prosser v. Evans*, (1895) 1 Q. B. 108, C. A.; *S. C.*, (1894) 2 Q. B. 101; overruling *Cambeport v. Chapman*, 19 Q. B. D. 229.

either surety, both of them would have been discharged. A very recent case on the subject under discussion is *Mercantile Bank of Sydney v. Taylor (a)*. There, in a suit against one of five joint and several sureties to recover the amount guaranteed, it appeared that the plaintiff had, without the defendant's knowledge and consent, released another of the sureties "from all debts due by him to the bank at this date." It was held that the plaintiff could not recover, and that the legal effect of the release could not be modified by evidence of verbal negotiations prior to the release for the purpose of showing an agreement to reserve rights against the sureties.

Surety
discharged
by creditor
agreeing to
give time to
principal
debtor.

(E.) *Subject to certain exceptions, the surety is discharged by the creditor agreeing to give time to the principal debtor.*

If the creditor, without the consent of the surety, enter into a binding agreement *with the principal debtor* to give him further time for payment, the surety will be discharged (b). This is the case, even though no

(a) (1893) A. C. 317.

(b) *Combe v. Woolf*, 1 M. & Scott. 241; 8 Bing. 156. And see *Lewis v. Jones*, 4 B. & C. 506; and note at p. 515. Observations of Lord HATHERLEY, L.C., in *Oriental Financial Corporation v. Overend, Gurney & Co.*, L. R. 7 Ch. App. 142, 150; L. R. 7 H. L. 348; 31 L. T. 322; *Samuel v. Howarth*, 3 Mer. 272; *Newton v. Chorlton*, 2 Drew. 333, 338; *Wright v. Simpson*, 6 Ves. 714, 734; *Nisbet v. Smith*, 2 Brown, C. C. 578, and note (a), 583; *Rees v. Berrington*, 2 Ves. jun. 539 a; *Clarke v. Henty*, 3 You. & Coll. 187; *Blake v. White*, 1 You. & Coll. Exch. 420. See note (a), p. 515, of 4 B. & C., observations of Lord ELDON, in *Harkshaw v. Parkins*, 2 Swanst. 539, 546. Observations of TINDAL, C.J., in *Browne v. Carr*, 7 Bing. 508, 515; *Ewin v. Lancaster*, 12 L. T. 632; 13 W. R. 857; *Bailey v. Edwards*, 4 B. & S. 761; 34 L. J. Q. B. 41. See also *English v. Darley*, 2 B. & P. 61; *Moss v. Hall*, 5 Exch. 46; *Oakeley v. Pashaller*, 10 Bligh (N.S.) 548; *Isaac v. Daniel*, 8 Q. B. 500; *Daries v. Stainbank*, 6 De G. M. & G. 679; *Pooley v. Harradine*, 7 E. & B. 431; *Bank of Ireland v. Beresford*, 6 Dow. H. L. 233; *Archer v. Hale*, 4 Bing. 464; *Eyre v. Bartrop*, 3 Madd. 221; *Howell v. Jones*, 1 C. M. & R. 97; *Greenough v. M'Clelland*, 2 Ell. & Ell. 426.

injury could accrue to the surety, for he himself is the fit judge of what is or is not for his own benefit (c). If you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and, therefore, your act breaks the agreement into which you have entered with the principal (d). According, however, to *Lindley, L.J.*, in *Rouse v. Bradford Banking Co.* (e), no case has yet decided that a surety has been discharged by an agreement by the principal creditor to give time to the debtor, where the surety had himself agreed not to require the debtor to relieve him until he was himself sued, and the law does not go that length. Moreover, it is not every agreement or promise made by the creditor, without the surety's express consent, which will have the effect of discharging the surety.

In the first place, an agreement by the creditor to give time to the principal debtor will not discharge the surety, and never did so either at law or in equity, The agreement to give time must be a binding one.

(c) *Samuel v. Howarth*, 3 Mer. 272. See also on this subject *Polak v. Everett*, 1 Q. B. D. 675 *et seq.*; *Holme v. Brunskill*, 3 Q. B. D. 495. See also per Lord Chancellor ELDON, in *Ex parte Glendinning*, Buck, 517, 519. In *Ex parte Gifford*, 6 Ves. 805, 806, and in *Ex parte Wilson*, 11 Ves. 410. Per Lord LANGDALE, M. R., in *Calvert v. The London Dock Co.*, 2 Keen, 638, 644; *Blest v. Brown*, 8 Jur. 603. But see *Newton v. Chorlton*, 2 Drew. 333, 339. And see *Petty v. Cooke*, L. R. 6 Q. B. 790, 795; 40 L. J. Q. B. 281; 25 L. T. 90; 19 W. R. 1112.

(d) Per Lord HATHERLEY, in *Oriental Financial Corporation v. Overend, Gurney and Co.*, L. R. 7 Ch. 150.

(e) (1894) 2 Ch. at p. 57; *S. C.* on appeal, (1894) A. C. 587. In this case A. L. SMITH, L.J., said the main reason why a surety is discharged by a binding contract to give time to which he has not assented is "that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, and that when he has paid it off, he is at once entitled in the creditor's name to sue the principal debtor, and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his consent."

unless it be of a *binding* character, and capable of being enforced (a), and unless made on valuable consideration (b). Thus, where a creditor knew that the surety was negotiating a loan for the principal debtor for the purpose of paying off therewith the debt for which the surety was liable, and thus getting rid of such liability, and the creditor made a promise to the debtor, without consideration, to give him further time, and this induced the surety to desist from his attempt to raise the money; it was held that the surety's liability to the creditor was not discharged (c).

Agreement giving time to principal debtor may be written or verbal.

An agreement by a creditor to give time to his principal may, however, in some cases be binding, whether it be written or verbal. Formerly, indeed, where the guarantee was under seal, if time were given to the principal debtor, by *parol* agreement, the surety could not set up such *parol* agreement as a defence at law (d), but was obliged to resort to a court of equity for relief; for, at law, an instrument could only be dissolved by one of equal or superior force (e). Eventually, however, by virtue of 17 & 18 Vict. c. 125, s. 83, such an agreement might have been pleaded to an action by way of equitable defence (f), though, of course the surety was still at liberty to resort to a court of

(a) *Clarke v. Birley*, 41 Ch. D. 422.

(b) *Blake v. White*, 1 Y. & C. 620; *Heath v. Key*, 1 Y. & J. 434. Per Lord ELDON, in *English v. Darley*, 2 B. & P. 61, 62. See also *London Assurance Co. v. Buckle*, 4 B. Moore, 153; *Hearn v. Cole*, 1 Dow. H. L. 459; *Philpot v. Briant*, 4 Bing. 717; *Clarke v. Wilson*, 3 M. & W. 208; *Badenall v. Samuel*, 3 Price, 521; *Brickwood v. Annis*, 5 Taunt. 614. Observations of POLLOCK, C.B., and CHANNELL, B., in *Price v. Kirkham*, 3 H. & C. 437; *Smith v. Winter*, 4 M. & W. 454; *Tucker v. Laing*, 2 K. & J. 745; *Petty v. Cooke*, 40 L. J. Q. B. 281; L. R. 6 Q. B. 790; 25 L. T. 90; 19 W. R. 1112; *Bell v. Banks*, 3 M. & G. 258; *Arundel Bank v. Goble*, Chitty on Bills, 11th ed., p. 300.

(c) *Tucker v. Laing*, 2 K. & J. 745.

(d) *Davey v. Prendergrass*, 5 B. & Ald. 187. Per Lord ABINGER, C.B., in *Blake v. White*, 1 Y. & C. 420, 425.

(e) *Davey v. Prendergrass*, *supra*.

(f) Per curiam, in *Woodhouse v. Farebrother*, 5 E. & B. 277, 289.

equity for relief. And now, since the passing of the Judicature Act, the defendant may raise in any court any equitable answer or defence which would formerly have been good by way of answer if the suit had been brought in a court of equity (*g*).

An agreement to give time need not, however, be made in express words in order to have the effect of discharging the surety. If in effect there be a giving of time by an *implied* agreement, that will operate to relieve the suretyship. Thus, for instance, where a bond creditor, by agreement with his debtor, takes interest by anticipation on his debt, a court of equity would formerly have restrained an action on the bond, whether brought against the principal or the surety (*h*). For such an agreement amounts to a giving of time, as, by taking interest, the creditor would be prevented from suing on the bond. So a creditor who takes a promissory note or bill from a debtor who is in default impliedly gives him time, since he cannot sue the debtor until the maturity of the bill or note (*i*). Likewise the renewal of a bill by the creditor may operate to discharge the surety, unless made with the assent of the latter (*k*). Again, where the obligee of a bond had placed himself in such a position with regard to the principal debtor that he could not demand payment of the bond until a certain agreement entered into with third parties had been carried into effect, it was held that this amounted to such a giving of time to the principal debtor as discharged a surety to the

(*g*) Judicature Act, 1873, s. 24, sub-s. (2). And see *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145.

(*h*) *Blake v. White*, 1 You. & Coll. 620.

(*i*) *Croydon Commercial Gas Co. v. Dickinson*, 1 C. P. D. 707; 2 C. P. D. 46.

(*k*) *Torrance v. Bank of British N. America*, L. R. 5 P. C. 246; 29 L. T. 109; 28 W. R. 329; and see *Delaware, Lack. and W. R. Rail. Co. v. Burkhard*, 43 New York S. C. R. 57.

bond (a). So a surety for the repayment of a mortgage debt was held to be discharged by a deed, executed without his consent and to which he was not a party, consolidating several mortgages and containing a covenant by the mortgagee to pay at a *later* date than was stipulated in the original mortgages (b).

Passive
inactivity
will not
discharge
surety.

Since, in order to discharge the surety, there must be a binding agreement by the creditor to give him time, it follows that mere *passive inactivity*, or omission to press the debtor, as distinguished from *an agreement* giving further time, will not discharge the surety (c), even when the debtor has become insolvent during the time thus suffered to elapse (d). Thus, when the surety set up, as a defence to an action brought against him by the creditor, that the latter had delayed an unreasonable time—to wit, ten years—to demand payment from the principal debtor, it was held, in a case decided in Ireland, to be a bad defence (e). The surety may, however, as we have seen (f), stipulate in his contract

Unless active
measures
against

(a) *Cross v. Sprigg*, 2 Mac. & G. 113.

(b) *Bolton v. Buckenham*, (1891) 1 Q. B. 278, C. A.

(c) *Trent Navigation Co. v. Harley*, 10 East, 34; *Wilks v. Heeley*, 1 C. & M. 249. *Per* GIBBS, C.J., in *Orme v. Young*, Holt, N. P. C. 84; *London Assurance Co. v. Buckle*, 4 B. M. 153; *Goring v. Edmonds*, 6 Bing. 94; *Peel v. Tatlock*, 1 B. & P. 419. *Per* JERVIS, C.J., in *Strong v. Foster*, 17 C. B. 201, 215; *York City and County Banking Co. v. Bainbridge*, 43 L. T. (N.S.) 732. *Per* Lord ELDON, in *Mayhew v. Crickett*, 2 Swanst. 185; *Boulton v. Stubbs*, 18 Ves. 20, 22; *Eyre v. Everett*, 2 Russ. 381; *Black v. The Ottoman Bank*, 10 W. R. (P. C.) 871; 6 L. T. 620; 8 Jur. (N.S.) 801; *Dawson v. Lawes*, 1 Kay, 280; *M'Taggart v. Watson*, 3 Cl. & Fin. 525. *Per* Lord ELDON, in *Samuel v. Howarth*, 3 Mer. 272, 278; *Perfect v. Musgrave*, 6 Price, 111. *Per* Lord COTTENHAM, in *Creighton v. Rankin*, 7 Cl. & Fin. 325, 346, 347; *Shepherd v. Beecher*, 2 P. W. 288. *Per* Lord ELDON, in *Wright v. Simpson*, 6 Ves. 714, 734. *Per* POLLOCK, C.B., in *Price v. Kirkham*, 3 H. & C. 437, 441; and see *Mayor, &c. of Kingston-upon-Hull v. Harding*, (1892) 2 Q. B. 494, 508.

(d) *Trent Navigation Co. v. Harley*, *ubi supra*.

(e) *The Belfast Banking Co. v. Stanley*, 1 C. L. Ir. 693.

(f) See *ante* p. 213.

that the creditor is not to sue him until after failure of the creditor's utmost efforts against the principal debtor, and in such a case, of course, mere passive inactivity on the part of the creditor would discharge the surety (*g*). principal expressly stipulated for.

Again, since it will not discharge the surety unless it be a *binding* agreement, it also follows that if an agreement be made to give time to the principal debtor, but such agreement never take effect, the surety is not discharged. Thus, for instance, if such agreement be conditional on the performance of some act by the principal debtor, which the latter omits to perform, as the operation of the agreement is wholly prevented, the surety is not discharged (*h*). And in a recent *American* case it was held that an agreement by a creditor to accept a certain percentage within a specified time in full of his claim, but containing no stipulation for delay or extension, and never complied with, did not discharge a surety for the debt (*i*). Inchoate agreement to give time will not discharge surety.

In the next place, in order to have the effect of discharging the surety, it is necessary that the agreement should be made with the principal debtor himself, and not with a mere stranger. An agreement made by the creditor *with a stranger* to give time to the principal debtor, even though it be binding, and made for a valuable consideration, does not operate as a discharge of the surety (*k*). Nor has it this effect if it be made with one of two or more co-sureties (*l*). Agreement to give time will not discharge surety unless made with principal debtor.

Lastly, in order to have the effect of discharging the surety, the agreement with the principal debtor must be The agreement must also

(*g*) *Holl v. Hadley*, 2 A. & E. 758 ; 8 Bing. 156 ; *Watson v. Alcock*, 22 L. J. Ch. 858 ; 17 Jur. 568 ; 4 De G. M. & G. 242 ; *Montague v. Tidcombe*, 2 Vern. 518. But see *Musket v. Rogers*, 5 Bing. N. C. 728.

(*h*) *Vernon v. Turley*, 1 M. & W. 316 ; *Badnall v. Samuel*, 3 Price 521. See also *Price v. Edmunds*, 10 B. & C. 578.

(*i*) *Miller v. Hatch*, 39 Amer. R. 346 (U. S.).

(*k*) *Fraser v. Jordan*, 26 L. J. Q. B. 288 ; 8 El. & Bl. 303. See also *Lyon v. Holt*, 5 M. & W. 250.

(*l*) *Clarke v. Birley*, 41 Ch. D. 422.

give time to
principal
debtor
himself.

an agreement *to give time* to him. If there be no giving of time the surety is not discharged. Thus, under the following circumstances, it was held that there had in reality been no giving of time, and therefore no discharge of sureties. Certain sureties, by the terms of their contract, were not to be liable till demand made on them. The creditors, when a balance was due to them from the principal debtors, took from the latter, without consulting the sureties, a warrant of attorney for the amount due, with a stay of execution if they should discharge the debt by instalments of 100*l.* a month, and on default, execution was to issue for the whole. It was held that the warrant of attorney certainly gave time, which might have discharged the sureties if they had been affected by it; but that here the sureties' liability, not arising *till demand*, and, previous to the demand, default having been actually made by the debtors, so that execution might have instantly issued for the whole debt, the agreement made by the warrant of attorney was at an end, and the sureties were no ways injured, as there was nothing to interfere with their immediate recourse to the principal debtors (a).

What
amounts to a
giving of
time.

Howell v.
Jones.

What is a "*giving time*" was defined by the Court of Exchequer in the case of *Howell v. Jones* (b) in the following terms:—

"We think it means extending the period at which, by the contract between them, the principal debtor was originally liable to pay the creditor, and extending it by a new and valid contract between the creditor and the principal debtor, to which the surety does not assent." In this case a guarantee was given by the defendant to the plaintiff, who was a banker, by which the defendant

(a) *Prendergast v. Devey*, 6 Madd. 124, 126. See also *Price v. Edmunds*, 10 B. & C. 578; *Jay v. Warren*, 1 C. & P. 532; *Whitfield v. Hodges*, 1 M. & W. 679; *Tatum v. Evans*, 54 L. T. 336.

(b) 1 Cr. M. & R. 97, 107.

became responsible for the amount of such cheques one *Bowers* might from time to time draw on the plaintiff. It was contended by the plaintiff that the defendant, as surety, was not discharged, though the plaintiff had on one occasion taken *Bower's* acceptance for the amount of his balance, inasmuch as in taking such acceptance the creditor was only dealing with the principal debtor on the original terms of the contract between them. *Bolland, B.*, in delivering the judgment of the court, said: "If, however, the creditor continues to deal with the principal debtor on the original terms of the contract between them, he cannot, we think, by any length of credit which he so gives, be properly said to give time to the debtor. The time must be given as an extension of the original credit. If, therefore, it could be shown, in fact, that the taking the three months' bill in this case in *February, 1828*, from the principal debtor was part of the original contract between the bankers and *Bowers*, for which the defendant became the guarantee, there would be much force in the arguments addressed to the court on the part of the plaintiffs, that the defendant was bound to know the nature of the contract which he guaranteed, and that the course of dealing between the bankers and *Bowers* might be properly referred to for that purpose. But, giving them the full benefit of the argument, it is disposed of by the facts of the case." And accordingly the court on these facts held that the defendant was discharged. In *Rouse v. Bradford Banking Co. (c)*, the facts were as follows:—The appellant and others being in partnership, a deed of dissolution was made whereby the appellant assigned his interest to the other partners, who covenanted with him to pay the partnership debts and to indemnify the appellant against them, with a proviso that he should not be entitled to require them to pay any of the debts so long as he was kept indemnified.

Among the debts was an overdraft of 50,000*l.* due to the respondents, a banking company. After the dissolution, the terms of which were made known to the respondents, a transaction was entered into between the new firm and the respondents, whereby the new firm were allowed for a limited period to increase the overdraft to 53,000*l.* It was held that there was under the circumstances no agreement to give time to the new firm, as the appellant had, by the above-mentioned proviso in the deed of dissolution, impliedly authorized the respondents to give his late co-partners time to pay the old debt, and that the respondents had not released the appellants.

Whether time has been given sometimes depends on construction of original contract.

Although the general meaning of the expression "giving time" is thus defined, it is nevertheless sometimes difficult to say what really was "the period at which, by the contract between them, the principal debtor was originally liable to pay the creditor." This sometimes has to be ascertained from the terms of the original contract between them. And in such cases the words used must receive a *reasonable* interpretation. Thus, in *Simpson v. Manley (a)*, a guarantee ran as follows: "If you give A. B. *credit* we will be responsible that his payments shall be regularly made." The question having arisen whether there had been a giving of time to A. B., it became necessary to decide when A. B. was, under these terms, bound to pay the creditor. The court held that the word "*credit*" meant a fair and reasonable credit according to the manner in which A. B. and the persons guaranteed should deal, and did not confine the guarantee to dealings according to the strict customary credit of the trade. Where a deed contained a covenant which necessarily implied that the principal debtor could not be sued for the debt guaranteed, it was held that the surety was discharged (*b*).

Or of deed alleged to give time to debtor.

(a) 2 C. & J. 12. (b) *Bolton v. Buckenham*, (1891) 1 Q. B. 278, C. A.

In other cases, again, the period at which the debtor becomes liable to pay the creditor is not indicated by any express agreement between them on the point. And in such cases the time at which the debtor becomes liable to pay is the time at which the *legal* liability accrues. Accordingly *custom of trade* would not apparently justify indulgence to the principal debtor (c). Thus, evidence that *according to the custom of the trade* the plaintiffs delivered coals to N. H. daily, and that at the end of every month he gave a bill payable in two months, was held not sufficient to charge the defendant upon a guarantee for the payment of coals to be delivered to N. H. at a credit of two months from the delivery (d). On the part of the defendant it was contended, that this was a dealing at variance with the express language of the guarantee, which was for a credit of two months from the delivery. On the part of the plaintiffs it was urged, that the delivery, being according to the custom of the coal trade, which must have been in the contemplation of the parties at the time the guarantee was executed, the whole supply of coals for each month must be considered as delivered on the last day of the month, which was a delivery within the terms of the guarantee. The plaintiffs, however, were nonsuited, and a rule to set the nonsuit aside was discharged.

It was formerly doubtful, prior to the introduction of equitable pleas, whether in order to enable a surety to raise at law a defence, on the ground that time had been given to the principal, it was necessary to show that the original contract between the plaintiff and the defendant was that of creditor and surety (e). It was, however,

Custom of trade will not justify giving of time to principal debtor.

Former distinctions between law and equity as to right of defendant to be treated as a surety where the

(c) *Combe v. Woulfe*, 8 Bing. 156; 1 M. & Scott, 241; *Holl v. Hadley* 5 Bing. 54; 2 A. & E. 758.

(d) *Holl v. Hadley*, *ubi supra*.

(e) *Manley v. Boycott*, 2 Ell. & Bl. 46; *Strong v. Foster*, 17 C. B. 201; *Bailey v. Edwards*, 4 B. & S. 761; *Ewin v. Lancaster*, 12 L. T. 632; 13 W. R. 857, and cases there cited; *Lawrence v. Walmesley*, 12 C. B. (N.S.) 799, 807. See also *Taylor v. Burgess*, 5 H. & N. 1; *York City & County Banking Co. v. Bainbridge*, 43 L. T. (N.S.) 732; *Ex parte Graham*, 5 De G. M. & G. 356.

contract
does not
distinguish in
express terms
between
principal and
surety.

decided in equity, that the holder of a security was, in dealing with the security, affected by knowledge acquired after taking the security, as to which of the parties liable on the security was the principal and which the surety (*a*).

In equity, the defendant's right to relief arose from the existence of the relation of principal and surety between the surety and the principal debtor, and from the creditor's actual or constructive knowledge thereof at the time he took the security; and the fact that the creditor did not agree to treat the surety as a surety did not debar the latter from such relief, and such knowledge might have been relied upon in a court of equity, and eventually might have been alleged in an equitable plea at law (*b*).

These
distinctions
no longer
exist.

These distinctions between law and equity are now abrogated, and as provided by the Judicature Act, 1873 (*c*), the equitable rule will now prevail when any conflict arises between legal and equitable doctrines. Moreover, it has recently been held that where two or more are indebted as principals, and it is *afterwards* agreed between themselves, that one shall be a surety only, and this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies (*d*).

Effect of
agreement to
give time

It may, however, happen that all these three requisites to his discharge may exist, that is to say: that

(*a*) *Oriental Financial Corporation v. Overend & Co.*, L. R. 7 Ch. App. 142; 7 H. L. 348; 31 L. T. 322; *Maingay v. Lewis*, 3 Ir. R. C. L. 495; and on appeal, 5 Ir. R. C. L. 229.

(*b*) *Greenough v. McClelland*, 2 Ell. & Ell. 424; and see *Goodman v. Litaker*, 37 Amer. R. 602 (U. S.).

(*c*) 36 & 37 Vict. c. 66, s. 25 (11).

(*d*) *Rouse v. Bradford Banking Co.*, (1894) A. C. 586, 591, 593; *S. C.*, (1894) 2 Ch. 32; *semble* overruling *Swire v. Redman*, 1 Q. B. D. 536; 35 L. T. 470; 24 W. R. 1069; and following *Oakeley v. Pasheller*, 4 Cl. & F. 207; 10 Bli. (N.S.) 548; and *Overend, Gurney & Co. v. Oriental Financial Corporation*, L. R. 7 H. L. 348. For observations on *Rouse v. Bradford Banking Co.*, see *ante*, p. 423.

there may be a binding agreement; that it is an agreement made with the principal debtor himself; and that it is an agreement to give time; and yet that the surety is not discharged. For there are certain cases in which although all these three requisites exist, it is held, that the surety cannot possibly be affected and is not discharged from his engagement. One instance, and perhaps the most common instance, of this is, where an agreement giving time to the principal debtor is expressly made *with a reserve of remedies against the surety*. For such a reservation prevents there being any discharge of the surety (*e*). The reason for this is, *first*, because it rebuts the implication that the surety was *meant* to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, *secondly*, because it *prevents* the rights of the surety against the debtor being impaired, the injury to such rights being the other reason why, in ordinary cases, the surety is discharged. For the debtor cannot, where there is a reservation, complain if the instant after paying the creditor the surety enforces his rights against him; and the debtor's consent that the creditor shall have recourse against the surety, is impliedly a consent that the surety shall have recourse against him (*f*). A creditor may, upon giving time to his debtor, reserve any right against the surety without communicating the arrangement to the surety (*g*).

In order to keep alive the liability of the surety it must, however, as a rule, appear *on the face* of the instrument giving time that the remedies against the

with reserve
of remedies
against
surety.

Reserve of
remedies
should
usually

(*e*) *Per* PARKE, B., in *Kearsley v. Cole*, 16 M. & W. 128. *Per* Lord Chancellor ELDON, in *Ex parte Glendinning*, Buck, 517, 519; *Wyke v. Rogers*, 1 D. M. & G. 408; *Boaler v. Mayor*, 19 C. B. (N.S.) 76, 83, 84; *S. C.* 13 W. R. 775; *Ex parte Gifford*, 6 Ves. 805, 808. See also *Owen v. Homan*, 4 H. L. Cas. 997, 1037; *Close v. Close*, 4 De G. M. & G. 176.

(*f*) *Webb v. Hewitt*, 3 K. & J. 438.

(*g*) *Ibid.*; *Kearsley v. Cole*, 16 M. & W. 128.

appear on
face of
instrument.

Where the
effect of
alleged
agreement to
give time is
to accelerate
surety's
remedies.

surety are reserved (a). Still, it seems that this is not *always* necessary, and that sometimes such a reservation may be proved by *parol* evidence (b). Certainly it may be proved by *parol evidence* that there was a general understanding between the creditor and the principal debtor, that the taking of a promissory note should not discharge the surety (c).

Another instance in which, although there is a binding agreement with the debtor to give him time, the surety is, nevertheless, not discharged, may also be mentioned. This is the case where the effect of the agreement between the creditor and the principal debtor is, in point of fact, to *accelerate* the surety's remedies. Obviously, as against the surety, this does not amount to an agreement giving time (d). Indeed, besides the cases which have been mentioned, it has been laid down as a general rule, governing all questions of this kind, that a surety is not discharged if his remedies are not interfered with (e); if the agreement is made with his assent (f); or if he subsequently confirms it (g). It has, moreover, recently been held in *Ireland*, that an extension of time to the debtor, though made with the creditor's consent, if it amounts to a *judicial* act, will not discharge the surety (h).

(a) *Ex parte Glendinning*, Buck, 517, 520. See also *Boulton v. Stubbins*, 18 Ves. 20, 22; *Oreend, Gurney & Co., Limited v. Oriental Financial Corporation*, L. R. 7 Ch. 142; 7 H. L. 348; 31 L. T. 322.

(b) *Per* Lord Justice TURNER, in *Ex parte Harvey*, 33 L. J. Bank. 26, 32. And see note (a), 4 B. & C. 515, 516.

(c) *Wyke v. Rogers*, 21 L. J. Ch. 611; 1 De G. M. & G. 408.

(d) *Hulme v. Coles*, 2 Sim. 12.

(e) *Per* BLACKBURN, J., in *Petty v. Cooke*, L. R. 6 Q. B. 790, 795; 40 L. J. Q. B. 281; 25 L. T. 90; 19 W. R. 1112.

(f) *Clerk v. Devlin*, 3 B. & P. 363; *Smith v. Winter*, 4 M. & W. 454; *Tyson v. Cox*, 1 T. & R. 395; *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 13 W. R. 922.

(g) *Per* Lord Chancellor ELDON, in *Mayhew v. Crickett*, 2 Swanst. 185, 192; *Smith v. Winter*, 4 M. & W. 467.

(h) *Provincial Bank v. Cussen*, 18 L. R. Ir. 382, C. A.

Neither does an agreement made with the principal debtor, after the surety has himself become a principal debtor and subject to a primary liability, discharge the surety. Thus, after a decree in equity had been obtained by the creditor against the surety, it was held that no arrangement giving time to the principal debtor, without the knowledge of the surety, would discharge the latter (i). The creditor "having by the decree established his right against the estate of the surety, has a right to proceed under it; and all that follows is in the nature of execution of the decree, and the subsequent dealing with the principal debtor does not operate to discharge the surety from a liability under which he is no longer *as surety*, but under the decree" (k). And, on the same ground, where, by an agreement made with the creditor subsequently to the guarantee, the surety has converted himself into a principal debtor, an arrangement giving time to the original debtor made *after* such agreement will not discharge or affect the surety. An example of this is afforded by the case of *Reade v. Lowndes* (l). In that case, judgment having been obtained against a surety, he entered into a *new* arrangement with the creditor (irrespective of the principal debtor), by which execution was not to issue while he kept up certain policies for securing the debt. It was held, that by this arrangement the surety became a principal, and that no subsequent dealing between the creditor and the principal debtor could annul it.

Where the document under which the liability of the surety arises contains a clause amounting to a consent or license that time may be given to the principal debtor, and that if time be so given he (the surety) will not avail himself of it as a defence, there will be no

Agreement to give time does not discharge surety who has previously become a principal debtor.

Or who, in his guarantee, has agreed that time may be given to the principal debtor

(i) *Jenkins v. Robertson*, 2 Drew. 351.

(k) *Per* KINDERSLEY, V.-C., in *Jenkins v. Robinson*, *supra*.

(l) 23 Beav. 361; 26 L. J. Ch. 793.

without
discharging
him.

To what
extent surety
is discharged
by agreement
giving time
to principal.

discharge of the surety should time be subsequently given by the creditor to the principal (a).

It is now necessary to consider *to what extent* a surety is discharged by an agreement giving time to the principal. In *Bingham v. Corbitt* (b), it was held that in the case of a continuing guarantee for the price of goods to be supplied to a person at a specified credit, if goods are supplied at a longer credit than that stipulated for by the surety, and these goods are subsequently paid for, and *afterwards* other goods are supplied at the specified credit, in respect of which default in payment is made by the principal debtor, the surety is liable for this default. In *The Croydon Commercial Gas Co. v. Dickinson* (c), the facts were as follows:—A principal (with sureties for the performance of the contract) contracted to take tar from a gas company, and to pay for each month's supply within the first fourteen days of the ensuing month, unless the company should by writing allow a longer time for payment. After the expiration of the first fourteen days of August, the company took a promissory note from the principal for the amount due for July. Default was made by the principal in payment of the amounts due in July, August and September. It was held that the sureties were discharged only as to the amount due in July, the contract being separable, and the position of the sureties as to the amounts due for August and September not being affected by the giving time for payment of the amount due for July. This decision has been followed in the *Irish* case of *Dowden v. Levis* (d). There the defendants were sureties to the

(a) See *Yates v. Evans*, 61 L. J. Q. B. 446; where, however, it was unnecessary to decide this point specifically; *Corper v. Smith*, 4 M. & W. 519; and cases cited, *ante*, p. 422.

(b) 34 L. J. Q. B. 37; 12 W. R. 1030.

(c) 2 C. P. D. 46; 1 C. P. D. 707; 46 L. J. C. P. 157; 36 L. T. 135; 25 W. R. 157.

(d) 14 L. R. Ir. 307.

plaintiffs for H. D., on a continuing guarantee for the value of goods to be supplied by the plaintiffs to H. D. not exceeding 3,000*l.* in all. The plaintiffs, without the knowledge or consent of defendants, having taken a bill from H. D. at three months still current for 45*l.*, on account of a portion of the sum due for goods supplied to H. D., the actual amount due being for goods previously ascertained, it was held that the defendants were not released from liability to pay the balance of the sum due for the goods supplied to H. D. under the guarantee, but were only discharged to the extent of the 45*l.* for which the bill was taken.

Where the surety pledges his personal credit by note, covenant, or otherwise, and by the same contract pledges his goods, or charges or mortgages his lands as security for the same debt, if time be subsequently given by the creditor to the principal debtor, not only will the surety himself be discharged from all personal liability, but the property which is comprised by his contract will also be released (*e*).

(*F*.) *The surety may be discharged by the creditor agreeing with the principal debtor to give time to the surety himself.*

It has recently been decided in the case of *The Oriental Financial Corporation v. Overend, Gurney & Co.* (*f*), that if the holder of a security agrees with the principal to give time to the surety, he thereby discharges the surety. Lord *Hatherley*, L.C., said, "If the creditor agrees with the principal that he will not sue the sureties, the case is stronger than the usual case of an agreement to give time to the principal, which only involves, by implication, an engagement not to sue the surety. The position of the surety is

Where surety and his property have both been pledged, for another's debt, the discharge of the surety by time given to debtor will release surety's property also. Discharge of surety by creditor agreeing to give time to surety himself.

(*e*) *Bolton v. Salmon*, (1891) 2 Ch. 48.

(*f*) L. R. 7 Ch. App. 142; 7 H. L. 348; 31 L. T. 322.

changed, because it is one thing to lie by and wait before suing the principal, during which time the surety has a right to come in, discharge the debt, and immediately sue the principal, and another thing to engage positively with the principal that time shall be given to the surety, and so tie up your own hands from doing that which would throw the surety upon the principal." Where, however, the creditor, by separate contract with the surety himself, made on good consideration, gives him further time, he (the surety) is not thereby discharged (a).

Discharge of surety by negligence of creditor.

(G.) *Another group of cases in which the surety is held to be discharged, by the conduct of the creditor, consists in those cases in which a loss has occurred through the negligence of the latter. Such negligence of the creditor may consist (1) in laches by him; or (2) in the loss by him of securities given for the guaranteed debt.*

By laches of the creditor.

(1.) *The surety may be discharged by the laches of the creditor.*

Mere passive negligence does not constitute laches.

It is a rule that the surety will be discharged if the creditor omit to do anything which he is bound to do for the protection of the surety, though mere passive negligence on his part will not have this effect (b). A good example of this rule is furnished by the case of *Watts v. Shuttleworth* (c). There it was stipulated in the agreement between the plaintiff and the principal debtor, that the plaintiff should insure from risk by fire the work which the principal debtor was doing for him. The defendant, when he became surety for the due

Specific instances of laches by creditor.

(a) *Defries v. Smith*, 10 W. R. 189.

(b) *Per HANNEN*, Sir J., in *Guardians of Mansfield Union v. Wright*, 9 Q. B. D. at p. 688, and *per COTTON*, L.J., in *Carter v. White*, 25 Ch. D. at p. 670; *Strong v. Foster*, 17 C. B. 201; 25 L. J. C. P. 106; *Mayor, &c. of Durham v. Fowler*, 22 Q. B. D. 394; *Belfast Banking Co. v. Stanley*, 15 W. R. 989.

(c) 7 H. & N. 353.

performance of the work, was informed of this stipulation. It was held that he was discharged by the plaintiff's omission to insure. In this case it was also expressly laid down in terms that in equity, upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or, if he *omits* to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. The following additional instances of the application of this rule may also usefully be cited :—Where a person binds himself by guarantee to indorse any bills which may be given in part payment of a debt to be contracted by a third person, the person so binding himself is discharged, unless a demand be made upon him to fulfil his engagement within a reasonable and convenient time (*d*).

In *Philips v. Astling (e)*, the defendant guaranteed the payment of a bill by the drawer or the acceptor. The party who gave this guarantee was not a party to the bill. The bill was not presented for payment when it became due, as it ought to have been ; two days afterwards notice that it remained unpaid was given to the drawers, but no notice was given to the defendant. The drawers and acceptor continued solvent for many months after the bill was dishonoured, and it was not until they had become bankrupts that payment was demanded of the defendant. Under these circumstances, because the necessary steps were not taken to obtain payment from the parties to the bill while they continued solvent, the Court of Common Pleas held the surety, *i.e.*, the person who guaranteed the payment of the bill, to be discharged.

A broker, when he bought goods for his principal, agreed for one-half per cent. to indemnify him from

(*d*) *Payne v. Ives*, 3 D. & Ry. 664.

(*e*) 2 Taunt. 206.

any loss on the re-sale. It was held that this undertaking was discharged when the principal had a fair opportunity of selling to advantage but neglected it, though he was afterwards obliged to sell at a loss (a).

Surety may be discharged by conduct of persons towards officer for whose good behaviour he is bound.

It also appears that where anyone gives security for the conduct of another in a certain office, which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law and discharge their duties (b). But though this is generally true, yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has by his conduct either prevented the things from being done, or *connived at their omission*, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that, but for such conduct, the omission or commission would not have happened (c). Thus, in the case of *Dawson v. Lawes* (d), a bond was given by two sureties for the faithful discharge of his duties by an official assignee in bankruptcy. Immediately upon his death, by the examination of his books, he was found to be a defaulter to a very large amount. Actions were commenced on the bond against the sureties. One of the sureties sought to restrain the action on the ground of the negligence of the officials, whose duty it was to examine the assignees' accounts, etc.

(a) *Curry v. Edensor*, 3 T. R. 524; and see *Mutual Loan Fund Association v. Sudlow*, 5 C. B. (N.S.) 449; 28 L. J. C. P. 108; 5 Jur. (N.S.) 338.

(b) *Per* Lord BROUGHAM, in *Mactaggart v. Watson*, 3 C. & F. 525; *Mein v. Hardie*, 8 Shaw & Dunlop, 346; *Montague v. Tidcombe*, 2 Vern. 518. See also *Dawson v. Lawes*, 23 L. J. (N.S.) 434, 439.

(c) *Per* Lord BROUGHAM, in *Mactaggart v. Watson*, 3 C. & F. at pp. 542, 543.

(d) 23 L. J. (N.S.) Eq. 434.

There did not appear, however, to have been any want of compliance by these parties with the rules and regulations in bankruptcy, and the motion for an injunction was refused. It was held, in this case, that to discharge a surety for the due performance of duties there must be, on the part of the obligee, such an act of connivance or gross negligence amounting to a wilful shutting of the eyes to the fraud, or something approximating to it. Again, in the case of *Guardians of Mansfield Union v. Wright (e)*, where the defendant disputed liability as surety for a collection of poor rates in respect of the sums omitted to be collected, upon the ground that the loss would not have occurred if the overseers had looked more diligently into the proceedings of the collector, it was held that as no negligence was imputed to the plaintiffs themselves, and they were not answerable for the conduct of the overseers, the defendant was not discharged from his liability as surety. Moreover, *Jessel, M.R.*, in his judgment, expressly states that in his opinion the defence would have failed even if the overseers had been the plaintiffs. And it was held, in a case decided in *Ireland*, that mere negligence, even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of a debtor, will not discharge the surety, and is no ground of equitable defence (*f*).

Where a bond is given for the good behaviour of another in an office or employment, the surety is entitled to call on the employer to dismiss the employed if, after the giving of the bond, the employed is guilty of acts for which he may be dismissed (*g*). And, consequently, if the employer has placed it out of his power to comply with this

Surety for
good
behaviour
may require
employer to
dismiss
employed for
misconduct.
Non-compliance with

(e) 9 Q. B. D. 683 ; 31 W. R. 312 ; 47 J. P. 228 ; and see *Watertown Fire Insurance Co. v. Simmons*, 41 Amer. R. 196 (U. S.).

(f) *Madden v. M'Mullen*, 13 Ir. C. L. R. 305.

(g) See *ante*, pp. 319, 381, 382..

such request discharges surety.

Aliter, where there is a mere omission to exercise power of suspension.

Mere omission by creditor to do something which he is not legally bound to do is not laches.

request of the surety, by continuing the employed in his service when he ought to have dismissed him, the surety is discharged (a). But it would seem that the omission by the creditor to exercise a power of suspension from office, as distinguished from a power of dismissal, would not terminate the surety's liability (b).

Upon the other hand, the rule that laches by the creditor discharge the surety, does not extend to mere omissions by the creditor to do something, which although he may have been requested to do it, he is not by his own promise, nor in any other way, legally bound to do. Thus, for instance, in *Shepherd v. Beecher* (c), A., on apprenticing his son to B., gave B. a bond for 1,000*l.* for his son's fidelity. The son embezzled 203*l.* which A. paid, but *desired B. not to trust the son any more with the cash*. Notwithstanding this, B. did trust the son again with the cash, and was *negligent* in calling him to account, and he embezzled 1000*l.* more. It was held that A. was liable, but not to answer more, in the whole, than 1,000*l.* *including* the first 203*l.* The court, in giving judgment, said: "The father having given this bond for his son's fidelity, though there was an embezzlement, and though the father sent this letter to the master, desiring him not to trust the son with receiving cash any longer, yet the father continued bound, *and ought not to have satisfied himself with sending the letter and taking no further care of the matter*, but should have endeavoured to have made some end with the master, *and to have got up the bond*; wherefore he must continue liable to answer some embezzlements, unless there should appear fraud in the master."

(a) *Sanderson v. Aston*, L. R. 8 Exch. 73; *Burgess v. Eve*, L. R. 13 Eq. 450; *Phillips v. Foxall*, L. R. 7 Q. B. 666.

(b) *Byrne v. Muzio*, 8 L. R. Ir. 396 Ex. D.

(c) 2 P. W. 288.

The surety is not discharged by the mere omission of creditor to give surety notice of misconduct of principal. Thus, in *Peel v. Tatlock* (d), it was decided that if A. became bound to B. for the honesty of C., who embezzles money, B. may maintain an action on the guarantee, though three years have elapsed without any notice having been given of the embezzlement of C. by B. to A.: at least, if A. was acquainted of the circumstances from any other quarter, and B. does not appear to have industriously concealed it from him, and A. will not be discharged from his guarantee, though B. appear to have given credit to C. for the amount of the sum embezzled.

Omission to give surety notice of misconduct of principal does not bar creditor's right of action.

If the guarantee for another's good conduct expressly stipulate that notice of any act of dishonesty committed shall be given to the surety, the omission to give such notice, like the omission to fulfil any other stipulation in the contract, will operate to discharge the surety. But such a proviso, unless expressly made to extend to acts of dishonesty which occurred on the part of the person employed *before* the guarantee was given, or the employment had commenced, is fulfilled by giving notice of such fraud and dishonesty only as would form the foundation of a claim under the guarantee (e).

Unless surety has expressly stipulated that such notice shall be given.

Neither is an accidental omission to answer an inquiry laches which will discharge a surety. Thus, in the case of *Oxley v. Young* (f), the defendant guaranteed to the plaintiff payment of goods to be supplied to C., upon an undertaking of D. to indemnify the defendant. The plaintiff accordingly informed the defendant that the goods were preparing, and afterwards shipped them for C. without giving notice to the defendant that they

Accidental omission to answer surety's inquiry is not laches.

(d) 1 B. & P. 419.

(e) *Byrne v. Muzio*, 8 L. R. Ir. 396, Ex. D., but see *Enright v. Falvey*, 4 L. R. Ir. 397, which was not cited to the Court in *Byrne v. Muzio*, *ubi supra*.

(f) 2 Bl. 613.

were shipped. Afterwards, D. desired to recall his indemnity, upon which the defendant wrote to the plaintiff to know whether he had executed the order. To this inquiry no answer was given by the plaintiff for a considerable time, he having gone abroad in the *interim*. Upon this the defendant, supposing from the silence of the plaintiff that the order was not executed, gave up his indemnity to D. It was held that the defendant still remained liable on his guarantee.

Nor creditor's omission to take proceedings which must have proved fruitless.

So, too, the omission of the creditor to take proceedings which would obviously have a fruitless result does not amount to laches or discharge the surety. Thus, in *Muskett v. Rogers* (a), a guarantee given by the defendant was to be void if the plaintiff should omit to avail himself to the utmost of any security he held of W. R., and if anything should prevent the defendant from retaining the proceeds of an execution levied on the property of W. R. It was held that the guarantee was not avoided by the plaintiff's omitting to put in suit a bill of exchange, drawn by W. R. and accepted by an insolvent still in prison, or by the defendant's being deprived of a part of the proceeds of his execution against W. R., such part being the value of the goods of another person wrongfully taken under that execution.

Or if he neglect at surety's request to sue principal, who afterwards becomes insolvent.

In cases where the guarantee does not expressly stipulate that the debtor shall be sued, before having recourse to the surety, it would seem that a surety is not released by the creditor's neglect to sue the principal upon request, although the principal afterwards become insolvent (b).

The rule laid down in *Watts v. Shuttleworth* (c), that an injurious act or omission of the creditor will discharge the surety, was held not to apply under the following circumstances:—A bank granted a letter of credit to a

(a) 5 Bing. N. C. 728. See *Holl v. Hadley*, 2 Ad. & E. 758.

(b) *Smith v. Freyler*, 47 Amer. R. 358 (U. S.).

(c) 7 H. & N. 353; *S. C.*, 5 H. & N. 235.

company, and agreed to accept bills drawn upon them by the company in respect of that credit, on the terms that the company should ship tea and forward bills of lading, invoices and policy of insurance on the tea to the bank, and should also draw on B. & Co. bills to be accepted by B. & Co. to an amount sufficient to cover the amount authorized by the letter of credit. B. & Co. guaranteed the performance by the company of these terms, "holding themselves responsible for the same." The company drew on the bank and the bank accepted the bills, but owing to the failure of the bank after the dates when the bills were drawn and before they became due, the company shipped no tea, and did not perform any of the terms agreed on. It was held, that the failure of the bank was no reason why the company should not have performed its part of the contract, and that B. & Co. were not relieved from their guarantee (*d*). It was also expressly held, that the failure of the bank did not amount to an *injurious act* so as to discharge B. & Co. (the sureties) within the rule laid down in *Watts v. Shuttleworth*.

The recent case of *Carter v. White* (*e*) is a good example of the doctrine that a surety is not discharged merely by the negligence of the creditor. There a debtor gave his creditor a bill of exchange accepted by himself, but with the drawer's name left in blank. The plaintiff, at the same time, as a surety deposited with the creditor certificates of stock in a joint stock company as collateral security for the debt. The debtor died insolvent without the creditor having filled in the drawer's name. The bill was never presented for payment, nor was notice given to the plaintiff of its non-payment. It was held, that the surety was not

Omission by creditor to render bill of exchange complete by inserting drawer's name, will not discharge surety for its payment.

(*d*) *Ex parte Agra Bank*, L. R. 9 Eq. 725. See judgment of BACON, V.C., in this case, at p. 732.

(*e*) 25 Ch. D. 66; 50 L. T. 670; 32 W. R. 692; 54 L. J. Ch. D. 138; and see *Belfast Banking Co. v. Stanley*, 1 Ir. C. L. R. 693.

discharged from liability by the omission of the plaintiff to fill up the drawer's name and to give notice of the non-payment of the bill to the defendant. It was held, also, that a bill of exchange, accepted for valuable consideration, with the drawer's name left in blank, may be completed by the insertion of the drawer's name after the acceptor's death.

Semble, where guarantee given to the Crown, laches on the part of latter do not discharge surety.

Discharge of surety *pro tanto* by loss of securities held by creditor.

In cases where the Crown is in the position of creditor, and a subject is the surety, the *laches* of the creditor do not, it seems, discharge the surety, as it is a general doctrine that *laches* cannot be imputed to the Crown (*a*).

(2.) *The surety is, generally speaking, discharged pro tanto by the loss, through the fault of the creditor, of securities received by the creditor from the principal debtor.*

We have already seen (*b*) that a surety is entitled to the benefit of all the securities which the creditor has against the principal. It follows, therefore, that, if the surety be deprived of this benefit by the act of the creditor, he will be discharged to the full extent of the security to which he was entitled (*c*); and, consequently, a creditor is bound to use diligence and care with regard to securities held by him. Thus, for instance, a creditor holding a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety so as to enable him, on paying the debt, to take the security in its original condition, unimpaired (*d*). The

(*a*) *The Queen v. Fay*, 4 L. R. Ir. 606; but see *The Zoe*, 11 P. D. 72, as to laches by the Crown.

(*b*) *Ante* pp. 321 *et seq.*

(*c*) *Wulff v. Jay*, 20 W. R. Q. B. 1030; *S. C.*, L. R. 7 Q. B. 756; 41 L. J. Q. B. 322; 27 L. T. 118; 20 W. R. 1030; *Capel v. Butler*, 2 S. & S. 457; *Straton v. Rastall*, 2 T. R. 366; *Williams v. Price*, 1 S. & S. 581; *Strange v. Fooks*, 4 Giff. 408; 11 W. R. 983. See also *Watts v. Shuttleworth*, 7 H. & N. 353; 5 H. & N. 235; *Ex parte Mure*, 2 Cox, 63.

(*d*) *Pledge v. Buss*, Johns. 633.

right of the surety is to have the same security in exactly the same plight and condition in which it stood in the creditor's hands (e). This doctrine does not, however, apply to such securities as life insurances. It is not the duty of the creditor on the bankruptcy of the debtor to keep up a policy on the life of the latter. On the contrary, it is his duty to sell and realize such a security (f). So where mortgaged property was sold by the mortgagor, with the consent of the mortgagees, in manner contemplated by the mortgage deed, it was held that the liability of the sureties for the mortgagor was not affected thereby (g).

Upon the same principle, again, an abandonment by the creditor of execution against the principal releases the surety, because the creditor is a trustee of the execution (h). This was also the case when, under the old law, the execution was against the body. So that a surety was discharged where the creditor, by neglecting the statutory formalities, lost the benefit of an execution under a warrant of attorney, which, according to the agreement of suretyship, he had proceeded to enforce upon a notice by the surety (i).

A surety, however, is not discharged where by conduct of the creditor a right of distress for rent in arrear is destroyed, as this is not strictly a security held by the creditor in respect of a debt within 19 & 20 Vict. c. 97, s. 5 (k).

(e) *Ib. per* WOOD, V.-C.

(f) *Coates v. Coates*, 33 Beav. 249. See also *Wheatley v. Bastow*, 7 De G. M. & G. 261.

(g) *Taylor v. Bank of New South Wales*, 11 App. Cas. 596.

(h) *Mayhew v. Crickett*, 2 Swanst. 185. See also observations of Lord ELDON, in *English v. Darley*, 3 Esp. 49, 50; 2 B. & P. 61; and of LEACH, V.-C., in *Williams v. Price*, 1 S. & S. 581.

(i) *Watson v. Alcock*, 1 Sm. & Giff. 319; 4 De G. M. & G. 242. See also *Wulff v. Jay*, L. R. 7 Q. B. 756; 20 W. R. 1030; 41 L. J. Q. B. 322; 27 L. T. 118; 20 W. R. 1030; but see *The Queen v. Fay*, 4 L. R. Ir. 606, 616.

(k) *In re Russell, Russell v. Shoolbred*, 29 Ch. D. 254.

Abandonment by creditor of execution against principal debtor.

Destruction of right of distress for rent does not discharge surety.

Security received from a co-surety must not be wasted.

Surety is not discharged, though creditor assigns debt or securities without notice to him.

Wheatley v. Bastow.

So, again, a surety has also an equitable right that any security given by a co-surety shall not be wasted (a). But it *seems* that this right is the only right which a surety possesses in respect of such a security.

In order, however, to effect a discharge of the surety, it must appear both that there has been a loss of securities, and that such loss was caused by the fault of the creditor. Thus, where there had not been any actual loss at all, but, at most, a transaction which *might possibly* have caused a loss and affected the surety's position, the surety is not discharged; and, accordingly, where a creditor has security upon the equitable interests of his debtor and of a surety in a trust fund, and such creditor assigns the debt, together with the securities for the same, it is not necessary to give the surety notice of such assignment, and the assignee does not lose his right against the interest of the surety, though no such notice be given. This is settled by the case of *Wheatley v. Bastow* (b). In that case, *Turner*, L.J., in his judgment says: "This point, so far as I am aware, is wholly new, and it is certainly of great importance, as it introduces a new element into the consideration of the cases of principal and surety. In the absence of authority, we can determine the question only upon principle. It must depend upon what are the relative obligations of the creditor, the assignee and the surety, arising out of the relation which subsists between them. The creditor is, no doubt, under the obligation of preserving the securities which he takes from the principal debtor, for (as observed by the Vice-Chancellor) the surety may entitle himself to the benefit of those securities, and, if any of them be lost by the act or default of the creditor, the surety may be wholly or partially discharged; *but the creditor enters*

(a) *Margetts v. Gregory*, 10 W. R. 630.

(b) 7 De G. M. & G. 261, 279, 280.

into no contract with the surety not to assign the debt or the securities. The law gives him the right to assign them, and, if he does so assign them, the obligation which attached upon the creditor attaches upon the assignee. The position of the surety is in no respect altered. The assignee, on the other hand, acquires by the assignment all the rights of the assignor, and it is difficult, I think, to see how the surety can be in a better position against the assignee than he was in against the assignor. The surety, it is said, has the right to know who is the assignee; but, admitting this right, the question still remains, is the right of the assignee against the surety destroyed, because the fact of the assignment has not been communicated to him? On whom does the law cast the *onus* of finding the creditor? Generally speaking, as I conceive, upon the debtor, but, apart from this consideration, the surety, if he have no notice of the assignment, may pay the creditor, and the payment, as I apprehend, will be perfectly good against the assignee, and if, upon the payment being made or tendered, the creditor be required to deliver, and does not deliver any securities held by him, the surety would, no doubt, be entitled to relief in this court, and to stay any proceedings by the creditor. It is to be remembered in these cases, that a surety, though a favoured debtor, is still a debtor, and that he may at any time relieve himself by paying the debt; and, further, that if notice to the surety of the assignment of the debt be held to be necessary, serious impediments to assignments by creditors may, in many cases, be created."

Neither, of course, is a surety discharged by the mere fact that a loss has taken place with regard to the property given as security. To discharge the surety, it must appear that such loss was in some way attributable to the fault of the creditor. And, even should a security prove absolutely worthless, whether it was so

Depreciation
in value of
securities
held by
creditor does
not discharge
surety.

originally or whether it became so afterwards, the surety is not discharged unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor (a). Thus, in *March* a trader assigned all his goods, etc., to A. B., to secure a composition to his creditors, and A. B. became liable for the payment. The wife of the trader became surety to A. B. in respect to her separate estate. In *November* the trader was made bankrupt, and A. B. entered into an arrangement by which he gave up the goods to the assignee. It was held that the first assignment to A. B. was an act of bankruptcy, and that the wife's separate estate as surety was not released (b).

Where
surety has
become a
principal, the
loss of
securities
held by
creditor does
not discharge
him.

Moreover, even where there has been a loss, and a loss caused by the fault of the creditor, the surety is not in all cases discharged. For, in analogy to a line of cases which have been before alluded to (c), it was held that where, by subsequent dealings with the creditor, the surety had converted himself into a principal debtor, and the creditor *afterwards* took the principal debtor in execution, and discharged him without payment, he had not thereby released the surety (d).

Discharge
of surety by
fulfilment of
purpose for
which
guarantee
was given.

IV. The fulfilment of the purpose for which the guarantee was given has, of course, the effect of completely discharging the surety. Such fulfilment usually takes place either :

- (1) By payment made by the principal debtor (p. 451) ;
- (2) By a set-off having arisen between the creditor and the principal debtor (p. 458) ; or
- (3) By payment made by the surety, and accepted by the creditor, in satisfaction of the surety's liability (p. 459).

(a) *Hardwick v. Wright*, 35 Beav. 133.

(b) *Ib.*

(c) *Ante*, p. 435 "Giving Time to Principal."

(d) *Reade v. Lowndes*, 23 Beav. 361.

(1.) *The surety is discharged if payment be made by the principal debtor.* (1.) Where payment is made by the principal debtor.

The surety, will, of course, be discharged if the debt guaranteed be paid by the principal debtor. And if it be only paid in part, the surety will be discharged *pro tanto*.

In the simple case of a payment of the debt being made by the principal debtor, in the ordinary course of business, generally speaking no difficulty or question arises. A surety is, of course, discharged if the principal debtor pay the creditor the amount of the secured debt. A payment made by the principal debtor will not, however, have the effect of discharging the surety unless it be a *valid payment*. Thus, where the creditor accepted money from the principal debtor which he thought, at the time he accepted it, was a good and valid payment, whereas, in fact, the payment amounted to a *fraudulent preference*, and as such was subsequently set aside, it was held, that the creditor had not thereby done an act against the faith of the contract with the surety, so as to discharge the surety (e).

It is, moreover, sometimes difficult to determine whether a particular transaction amounts to a payment by the debtor. Thus, in *The Guardians of the Lichfield Union v. Green* (f), the defendant executed a bond conditioned to be void if G. *should honestly, diligently, and faithfully perform and discharge the duties of his office* as treasurer of a poor law union. One of the duties was to pay out of any money for the time being in his hands belonging to the guardians, all orders, etc., drawn upon him. G. was a country banker issuing his own notes. On the 28th December the plaintiffs, the

(e) *Petty v. Cooke*, L. R. 6 Q. B. 790; 40 L. J. Q. B. 281; 25 L. T. 90; 19 W. R. 1112; and see *Pritchard v. Hitchcock*, 6 M. & G. 851; 6 Scott, N. R. 801; 12 L. J. C. P. 322.

(f) 1 H. & N. 884; 26 L. J. Ex. 140; 3 Jur. (N.S.) 247.

guardians of the union, drew several orders for money, some of which, to the extent of 95*l.*, were on that day presented at G.'s bank, and were paid in notes of the bank. On the 31st December the officer of the union presented other orders, and received 200*l.* in notes of G.'s bank. On the same day, the plaintiffs having to transmit money to London, their clerk presented to G. an order for 4*l.* 19*s.* 8*d.*, and obtained from him a common banker's draft on a bank in London, which was afterwards dishonoured. G. stopped payment at three o'clock on the 31st December, and on the 1st January was declared a bankrupt. It was held, that the defendant, as surety, was not liable to make good either of the three several sums of money to the plaintiffs, on the ground that, as far as related to the 95*l.*, the plaintiffs by retaining it in their possession during the Saturday, thereby conclusively elected to treat the orders as paid, and that the sureties had a right to treat the transaction as payment; and that, as far as related to the other two sums, inasmuch as the plaintiffs, instead of claiming their right of being paid in sovereigns or Bank of England notes, thought fit to receive the country notes from G., the obligation of the defendant was thereby satisfied and discharged.

Surety
entitled to
benefit of all
payments
obtained from
principal,
whether
voluntarily
or by
compulsion.

The surety is not only entitled to the benefit of all payments made by the principal debtor voluntarily and in the usual course of business, but he is also entitled to the benefit of all payments obtained from the principal debtor by process of law or by the realization of securities given by him.

If the creditor makes available any of the securities for the debt guaranteed, the surety is entitled to benefit thereby. So, where the creditor distrained upon goods mortgaged to the surety by the principal debtor, for the *same* debt in respect of which the distress issued, it was held, that the surety's liability was discharged to

the extent of the sum produced by the sale of the goods (a).

It frequently becomes a question, moreover, whether a payment made by the principal debtor was made on account of the debt guaranteed or in respect of some other matter. Consequently, the doctrine of appropriation, or, as it was termed in Roman law, "imputation," of payments, is one of great importance to sureties. Where, for instance, the principal debtor is indebted to the creditor in *two* sums, and for the payment of *one* of them *only* a guarantee has been given, and subsequently to the contracting of these two debts, sums of money not sufficient to cover either debt are paid to the creditor by the debtor, the question arises, in respect of which of the debts are these sums paid? The law of England, in regard to the appropriation of payments, is concisely stated by *Tindal, C.J.*, in *Mills v. Fowkes* (b), in the following words:—"According to the law of England the debtor may, in the first instance, appropriate the payment, *solvitur in modum solventis*; if he omit to do so, the creditor may make the appropriation, *recipitur in modum recipientis*; but if neither make any appropriation, the law appropriates the payment to the earlier debt." It is necessary to observe that, according to our law, if the *debtor* wishes to appropriate a payment to a particular debt, he must exercise the option *at the time of making the payment* (c). But it is not necessary that the *creditor* who receives the money should make an *immediate appropriation* of it. "The payee

Doctrine of
appropriation
of payments.

(a) *Pearl v. Deacon*, 24 Beav. 186; and see *Kinnaird v. Webster*, 39 L. T. R. 494; 27 W. R. 212; 10 Ch. D. 139; and see *Taylor v. Bank of New South Wales*, 11 App. Cas. 596, 603.

(b) 5 Bing. N. C. 455—461. See further *Clayton's case*, Tudor's L. C. Merc. and Maritime Law, 3rd ed., p. 1, and notes thereto. See also 1 Story, Eq. Jur., Pothier on the Law of Obligations (Evans' ed.), pp. 368—376.

(c) Tudor's L. C. Merc. and Maritime Law, 3rd ed., p. 18, and cases there cited.

may make the appropriation at *any time* before the matter comes to trial, and he is not bound to give notice thereof to the payer" (a). He may, moreover, make the appropriation to a *statute barred* debt (b), though not towards the liquidation of one rendered *void* by statute (c).

Appropriation of payments according to Roman civil law.

According to the Roman civil law, however, the creditor, as well as the debtor, had to make the appropriation *at the time of payment* (d). Also, according to that law, if neither the debtor nor creditor exercised the right of appropriation, the payment was applied to the more burdensome of two debts where one was more burdensome than the other, thus favouring the debtor rather than the creditor (e). If, however, both debts were equally burdensome, then the payment was applied to the earlier debt (f).

The doctrine of appropriation of payments applied where sureties claim benefit of payments made by principal.

An instance of this doctrine of appropriation of payments being applied in ease of the surety is afforded by the case of *Marryatts v. White* (g). There security was given by a surety for goods to be supplied to his principal. Goods were subsequently supplied, and payments were from time to time made by the principal. In respect of some of these payments, discount was allowed for prompt payment. It was held that it must be inferred in favour of the surety that all these payments were intended in liquidation of the latter account. In *Kinnaird v. Webster* (h) the following

(a) Tudor's L. C. Merc. and Maritime Law, p. 21, and cases there cited; and see *Commercial Bank of Australia v. Official Assignee of the Estate of Wilson & Co.*, (1893) A. C. 181, where an agreement between creditors and some of the sureties gave the former power to appropriate as they thought fit a certain sum paid by the latter in discharge *pro tanto* of the principal debt.

(b) *Mills v. Fowkes*, 5 Bing. N. C. 455; but see *Nash v. Hodgson*, 6 De. G. M. & G. 474.

(c) *Keeping v. Broom*, 11 T. L. R. 595.

(d) Dig. lib. 46, tit. 3, s. 1.

(e) Dig. lib. 46, tit. 3, s. 5.

(f) *Ibid.*

(g) 2 Stark. 101.

(h) 10 Ch. D. 139; 39 L. T. R. 494; 27 W. R. 212; 48 L. J. Ch. 348 and see *Field v. Carr*, 5 Bing. 13; *Toulmin v. Copland*, 3 Y. & C. Ex.

were the facts:—The sum of 2,000*l.* was advanced by A. & Co., bankers, to B., a customer of theirs, and placed by them to the credit of his general current account. A. & Co. took as security for the advance ten promissory notes to mature during a period of ten weeks, at the rate of one note per week. C., as surety for B., gave a written undertaking that if the promissory notes and interest on any of them were not duly paid he would, upon demand, secure payment of the same by a mortgage of certain specified property. Moneys were paid from time to time into B.'s account more than sufficient to meet the bills if they had been so applied; but as the account was at the same time largely drawn upon it was, when the bills matured, largely overdrawn. A. & Co. having claimed for a mortgage upon the property of C., it was held that A. & Co., having received moneys which they might have applied in payment of the notes secured by the surety which had fallen due, were bound to have so applied them, and that the debt was moreover discharged on the principle of *Clayton's case*, *ubi supra*. In a subsequent case this decision was supported upon the ground that the intention of the parties was that only if sufficient money was not paid in by the principal debtor to meet the bills, was the guarantor to be looked to for payment (*i*). Upon the other hand, it has been held that a payment by the obligor of a bond to the obligee, to whom the obligor is also otherwise indebted, cannot, without some circumstances to show that it was *intended* to be made in discharge of the bond, be so applied in favour of the surety of the obligor in an action upon the bond under the defence of payment (*k*). So,

625; *Copland v. Toulmin*, 7 Cl. & Fin. 349; *Pemberton v. Oakes*, 4 Russ. 154; *Bank of Scotland v. Christie*, 8 Cl. & Fin. 214; *City Discount Co. v. Maclean*, L. R. 9 C. P. 692.

(*i*) *In re Booth*, *Browning v. Baldwin*, 27 W. R. 644, 645; 40 L. T. R. 248.

(*k*) *Plomer v. Long*, 1 Stark. 153, and see note (*a*) at the end of this case. See also *Wright v. Hickling*, L. R. 2 C. P. 199.

also, in the case of *Williams v. Rawlinson (a)*, the doctrine of appropriation of payments was held not to discharge the defendant. In that case the defendant executed a bond conditioned to secure the plaintiffs, who were bankers, for any sums which for ten years the plaintiffs should advance on bills, etc., which T. should from time to time draw on them, or make payable at their house, and all cheques, etc., not exceeding 5,000*l.* in the whole. It was agreed that this bond should not affect a prior security given by T. to the plaintiffs. No notice was given to the defendant by the plaintiffs that T. was indebted to them 10,000*l.* at the time the defendant executed his bond. T., however, saw the accounts every fortnight, and received the vouchers half-yearly. At the close of his account, T. was indebted to the plaintiffs more than 10,000*l.*; but, subsequently to the executing of the defendant's bond, he had paid into the plaintiffs' bank more than 5,000*l.* It was held that the defendant was liable to the extent of 5,000*l.* *Best, C.J.*, said:—"When the money was paid, nothing was said as to the account to which it was to be applied, and if the two accounts were blended, the course of business is to apply the payments to the earlier; that is the principle laid down in *Clayton's case (b)* and confirmed in *Bodenham v. Purchas (c)*, but here the accounts must have been blended, for the defendant's principal agreed to such an application of his payments; his accounts were settled half-yearly, and he must have seen that the remittances subsequent to the bond had been applied to the 10,000*l.*"

Presumption
in favour of
appropriation
of items of

The presumption that where a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of

(a) 2 Bing. 71. See also *Kirby v. Duke of Marlborough*, 2 M. & S. 18; *Simson v. Ingham*, 2 B. & C. 65.

(b) 1 Mer. 572.

(c) 2 B. & Ald. 39. See *Hart v. Alexander*, 2 M. & W. 484.

date, in the absence of other appropriation, may be rebutted by the circumstances of the case showing that such could not have been the intention of the parties (*d*). It is quite clear that the mere existence of a suretyship does not, in the absence of express contract, take away from the principal debtor and creditor those powers which they would otherwise have of appropriating payments which are not subject to any particular contract with the surety (*e*). S. guaranteed the account of T. at a bank by two guarantees, one for 150*l.*, the other for 400*l.* By the terms of the guarantee, the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from the customer to you on the general balance of his account with you;" the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee. S. having died, leaving T. and another executors, the bank on receiving notice of his death, without any communication with the executors beyond what would appear in T.'s pass book, closed T.'s account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the over-draft, but debited him with interest on the same, and continued the account until he went into liquidation, when it was also withdrawn. It was held (reversing the decision of *Bacon*, V.-C.), that there was no contract, express or implied, which obliged the debtor and creditor to appropriate to the old over-draft the payments made by the debtor after the

credit to
items of debit
in order of
date may be
rebutted.

(*d*) *City Discount Co. v. McLean*, L. R. 9 C. P. 692. See also *In re Booth, Browning v. Baldwin*, 27 W. R. 644; 40 L. T. R. 248.

(*e*) *Ex parte Whitworth, Re Mayor*, 2 M. D. & De G. 164; *Jamaica (A. G.) v. Manderson*, 12 Jur. 383.

Doctrine of appropriation does not prevent rateable distribution of dividend on bankruptcy of principal debtor where there is a surety for payment of debt by instalments.

Discharge of surety by set-off between principal and creditor.

determination of the guarantee, and that the bank was entitled to prove against the estate of S. for the amount of the old over-draft less the amount of the dividend which they had received on it in the liquidation (a).

The doctrine of appropriation of payments does not enable a person who, as surety, is the obligor of a bond for the payment of money by instalments, to have the whole dividend received by the creditor upon the *whole debt*, under the bankruptcy of the principal debtor, applied in discharge of that instalment. Such dividend can only be *rateably* applied, in part payment of each instalment as it becomes due (b).

2. *The surety may be discharged by a set-off existing between the principal debtor and the creditor.*

By the *Roman civil law*, *compensatio*, or set-off, operated as an *extinguishment* of the debt, *ipso jure*; hence it had the same effect as payment, to which it bore a near affinity, and by its operation the debtor was liberated from his debt and his sureties from their obligation (c). By *English law*, however, a set-off existing between the principal debtor and the creditor is certainly *not* regarded as operating to cause AN EXTINCTION of the debt between the parties. But where the creditor, without the consent of the surety, becomes indebted to the principal debtor in a sum which would amount to a set off *in full*, the surety has a *complete* defence against the creditor, which he might formerly have availed himself of, by *equitable plea*, in an action at law (d). The Judicature Act now enables a defendant

(a) *In re Sherry, London and County Banking Co. v. Terry*, 25 Ch. D. 692; 53 L. J. Ch. 404; 50 L. T. 227; 32 W. R. 394; and see *Williams v. Rawlinson*, 3 Bing. 71.

(b) *Martin v. Brecknell*, 2 M. & S. 38.

(c) Colquhoun's Summary of the Roman Civil Law, par. 1843.

(d) *Bechervaise v. Lewis*, 20 W. R. C. P. 726; *S. C.*, L. R. 7 C. P. 372; 41 L. J. C. P. 161; 26 L. T. 848; and see *Benedict v. Rea*, 42 New York S. C. R. 34.

to raise any equitable answer or defence in any court, that is to say, anything which would formerly have been good by way of answer if the suit had been brought into chancery (*e*). If the set-off be *partial*, and not complete, then the surety has only a defence *protanto*.

In the case of *Bowyear v. Pawson* (*f*), an unsuccessful attempt was made to extend the surety's right of set-off to a case where the sum claimed by the surety consisted of a share of a debt which the plaintiff owed to him and another (the principal debtor) who was not a party to the action. The facts of the case are as follow:—Action on a covenant to pay all liabilities which the plaintiff might incur under a deed of assignment made between the plaintiff and other parties. The defendant pleaded that the covenant was the joint and several covenant of himself and one Wilson, and that before action the plaintiff was indebted to Wilson in an amount exceeding the plaintiff's claim against the defendant, and that Wilson had assigned the plaintiff's debt to himself and the defendant as tenants in common in equal shares. As to one-half of the plaintiff's claim the defendant claimed to set off one-half of the debt so assigned, and as to the other half the defendant said that he was entitled to be exonerated by Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim. The court held, that the defence was no answer to the plaintiff's claim, and refused to allow the set-off.

(3.) *The surety may be discharged by payment made by him and accepted by the creditor in satisfaction of the suretyship liability.*

It is sometimes difficult to determine what amounts to a money payment by a surety. A note of hand payable with interest and accepted by the creditor is

Discharge of surety by payment accepted from him by creditor in satisfaction. What amounts to a

(*e*) Judicature Act, 1873, s. 24, sub-s. (3).

(*f*) 6 Q. B. D. 540; 50 L. J. Q. B. 495; 29 W. R. 664.

payment in
money by a
surety.

semble sufficient (a). This question, however, need not be dealt with further here, as it has already been referred to on a previous page (b). Whatever a creditor entitled to a liquidated money payment chooses to accept in satisfaction thereof, unless it be *merely* a smaller sum of money (c), will discharge the surety so far as *he* (the creditor) is concerned at all events.

Whether a particular payment made by a surety operates as an extinguishment of his liability under a particular guarantee may give rise to doubt in cases where the surety is, independently of his guarantee, liable on his own account to the creditor. In such cases it is desirable, in order to avoid all question, for the surety to require his guarantee to be given up to him on his making the payment. On this subject the case of *Waugh v. Wren* (d) may be usefully referred to. There a surety guaranteed that certain deeds which had been deposited by his principal with a bank, as security for the amount then due or thereafter to become due from him to the bank, so that the whole should not exceed 2,000*l.*, were good for the amount specified. Afterwards when the principal was indebted to the bank in the amount of 4,000*l.*, the surety paid them 3,000*l.* and received back the guarantee, his object being, according to his own statement, to liquidate his own engagement and to reduce the debt of the principal. It was held that the payment made by the surety was obviously intended by him to be, and was received in discharge of, the suretyship liability, and not in redemption of the deeds deposited by the principal debtor with the creditor. On the other hand, in the recent case of

(a) *Barclay v. Gooch*, 2 Esp. 571; *Rodgers v. Maw*, 15 M. & W. 449; *M'Kenna v. Harnett*, 13 Ir. L. R. 206; but see *Taylor v Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & Ald. 51.

(b) *Ante*, pp. 306, 307.

(c) See *Cumber v. Wane*, 1 Sm. L. C., 10th ed., p. 325.

(d) 11 W. R. 244.

Commercial Bank of Australia v. Official Assignee of the Estate of Wilson & Co. (e) a payment made by sureties to their creditor in substitution of their *original* liability under a guarantee was held not to operate as payment of the principal debt until appropriation by the creditor and therefore not to relieve the estate of a bankrupt co-surety who claimed the benefit of such payment made by his co-sureties under an agreement to which he was not, however, a party. Again, where a person who has given an indemnity to another alleges that it has been discharged owing to some arrangement whereby the pecuniary liability indemnified against has been compromised by a payment of a specific sum of money made by him and the party holding the indemnity, in the absence of a contract to discharge the indemnity, the person to whom it was given cannot be estopped from enforcing it by any representation, express or implied, of his intention to abandon it, where there has been no misrepresentation of *existing facts* (f), and where of course it has not yet been satisfied by payment.

V. The surety may of course be discharged by the creditor forgiving him his debt and releasing him from all further liability under his guarantee. On this subject, it is not surprising to find an almost total absence of direct authority. It seems, however, to have been held that mere voluntary declarations indicating the intention of a creditor to forgive or release the surety from his liability do not constitute a release in equity, which in such cases, always followed the law, unless there were a consideration or other equitable ground of distinction (g).

Discharge of the surety by the creditor releasing him from liability.

(e) (1893) A. C. 181.

(f) *Chadwick v. Manning*, (1896) A. C. 231 ; and see *Jordan v. Money*, 5 H. L. C. 185.

(g) *Cross v. Sprigg*, 6 Hare, 552 ; but see *Yeomans v. Williams*, L. R. 1 Eq. 184.

Discharge of
surety by
operation of
Statute of
Limitations.

VI. Supposing none of the contingences which have been now enumerated happen to the suretyship, it will, in process of time, like other contracts and rights, become extinguished by the operation of the Statute of Limitations.

A discharge of the surety may take place by the operation of the Statute of Limitations.

In the case of a guarantee *not under seal*, after six years have elapsed from the period at which the surety first became liable to make payment to the creditor, the right of the creditor to compel him to do so will be barred by 21 Jac. 1, c. 16, s. 3 (a). If, however, the guarantee be under seal, the creditors' rights against the surety will not be barred until the expiration of *twenty years* (b). It is frequently a matter of some little difficulty to determine *when* the right of the creditor to call upon the surety for payment first commenced, and the Statute of Limitations, therefore, began to run. This question must, to a great extent, depend upon the circumstances of each individual case, but the following decisions may be useful as a guide :—

When the
Statute of
Limitations
begins to run
against the
creditor.

Where
surety's
promise is to
pay a debt on
demand the
Statute does
not run till
demand
made.

In the recent case of *In re J. Brown's Estate, Brown v. Brown* (c), it was held that if a surety promise to pay a debt *on demand* as collateral security, as a demand is necessary before an action can be brought against him, the Statute of Limitations begins to run, not from the time when the debt became due, but from the demand.

(a) See *Collinge v. Heywood*, 9 A. & E. 633; *Angrove v. Tippet*, 11 L. T. (N.S.) 708, Q. B.; *Reeves v. Butcher*, (1891) 2 Q. B. 509, C. A.

(b) 3 & 4 Will. 4, c. 42, s. 3. For the *general* effect and operation of the Statute of Limitations, the reader is referred to works treating on the law of contracts generally.

(c) (1893) 2 Ch. 300. So where there is a bond payable on demand, there is no breach of condition until demand made; see *Carter v. Ring*, 3 Camp. 459; *Sicklemore v. Thistleton*, 6 M. & S. 9; *Toms v. Wilson*, 4 B. & S. 442.

In *Colvin v. Buckle* (d), the defendants gave the following guarantee:— *Colvin v. Buckle.*

“ You having expressed some doubt of the propriety of paying Mr. Gooch his draft on you for 850*l.* in our favour, we hereby engage, if you will pay us the same, we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, *either from the state of Mr. Gooch's pending accounts with your London or Bengal house, or from any other circumstances.*” It was held that the Statute of Limitations began to run against the plaintiffs *when all the facts were ascertained upon which the defendant's legal liability depended*, and that the delay in the adjustment of the accounts between the plaintiffs and Gooch, caused by needless litigation, in which the plaintiffs were engaged, did not prevent the Statute of Limitations from running.

In *Henton v. Paddison* (e), the facts were as follows:— On the 20th January, 1881, E. P., in consideration of an advance of 2,000*l.*, mortgaged certain real estate to G. H., and covenanted to pay 2,000*l.* and interest at 5 per cent. per annum on the 20th July, 1881, and to pay interest at the like rate half-yearly on the 2,000*l.*, or so much of it as should for the time being remain owing, until the same should be fully paid. On the 9th May, 1882, C. F. P. executed a document in the following terms, namely:—“ I, C. F. P., for the consideration therein mentioned, do hereby guarantee to the said G. H. repayment of the sum of 2,000*l.*, and interest for the same” at 5 per cent. per annum. This guarantee was referred to, in the correspondence relating to the execution thereof, as “ the guarantee of E. P.'s mortgage.” Interest was regularly paid by E. P. until the 20th July, 1891, and he died on the following 13th September, when the proceeds of his estate and the property comprised in the mortgage proved sufficient to

(d) 8 M. & W. 680.

(e) 68 L. T. 405.

pay 600*l.* only of the mortgage debt. An action having been brought against C. F. P., to recover the balance of 1,400*l.*, it was held by *Stirling, J.*, that the liability of C. F. P. was confined to the repayment of the *whole* 2,000*l.* and interest, and not *a part* of them nor so much as the mortgagor may be unable to repay, still less so much as may not be recovered from the mortgagor or out of the property comprised in the mortgage. It was also held that C. F. P. had not guaranteed the mortgage, and that as the mortgagee might (consistently with reasonable forbearance towards E. P.) have sued him more than six years before action brought against C. F. P. on his guarantee, all remedy against C. F. P. was barred by the Statute of Limitations.

Holl v.
Hadley.

In *Holl v. Hadley* (a), H. gave the plaintiffs a guarantee for the value of coals to be supplied to N. H., on condition that no application should be made to him (H.) for payment, but “on failure of the utmost efforts and legal proceedings” of the plaintiffs to obtain payment from N. H. Coals were supplied under the guarantee, and remained unpaid for till April, 1820. At that period H., in consideration of the plaintiffs giving N. H. (the principal debtor) “*two years and upwards*” for the liquidation of his then debt, agreed to reserve to the plaintiffs all claim that they might have upon him, H., by virtue of the former security, and “to be bound by the consequence thereof, if at the expiration of such period,” the plaintiffs should not have been paid. N. H. never paid the debt. In *April*, 1824, he went to *France*, but was occasionally in *England*, privately and for short periods, from that time till 1830, when he finally returned. The plaintiffs issued process against him in June, 1826, and continued it till 1830, when they arrested N. H. upon it on his return to England. Soon afterwards he became insolvent. In July, 1828, the plaintiffs commenced an

(a) 2 A. & E. 758 ; 5 Bing. 54.

action against H. on his guarantees ; that action abated by his death in 1829. Afterwards, in June, 1829, the plaintiffs brought an action upon the guarantees against his executors, who pleaded the Statute of Limitations. Issue was joined on that plea. It was held that, assuming that the first guarantee was incorporated with the second, a reasonable time must be allowed after the expiration of the two years for the plaintiffs to endeavour to obtain payment from H. Nevertheless that the plaintiffs, having allowed two years to pass without proceeding against N. H., after which he went abroad, had certainly exceeded such reasonable time, and were barred of their remedy against H. by the Statute of Limitations in July, 1828.

In *Hartland v. Jukes* (b) the facts were as follow :— *Hartland v. Jukes.*
In the year 1855 W. Courtney proposed to open a banking account with the Gloucestershire Banking Company, and thereupon he and W. Steward, as his surety, gave the banking company their joint and several promissory note for 200*l.*, and at the same time a memorandum in writing was signed by them and delivered to the banking company. This memorandum, in effect, provided that the promissory note was given as a further and collateral security to the banking company, for the banking account intended to be kept by W. Courtney with them, and that it should be held by them, and that they should be at liberty to recover thereon to the full amount thereof all the money which W. Courtney should at any time thereafter become liable for or indebted to the banking company on his banking account. The account was opened, and on December 31st, 1855, W. Courtney was indebted to the banking company in 173*l.* No demand of payment was made, however, nor was a balance struck until June 30th, 1856, when 194*l.* was due to the banking company on the account. A balance was

(b) 1 H. & C. 667.

afterwards struck every half-year, the banking company from time to time making advances, and W. Courtney paying money into the bank with which his account was credited. The sums so credited exceeded the value of the promissory note. The account was not closed till February, 1861, when a balance of 161*l.* was due to the banking company. In March, 1862, the banking company commenced an action on the note against W. Steward's executors. It was held that the cause of action was not barred by the Statute of Limitations.

Indemnity
against costs
gives no right
of action till
costs paid,
when Statute
begins to run.

Where there is a contract to indemnify a plaintiff against costs, which he is afterwards called upon to pay, the cause of action arises when he actually pays, and not when the costs are incurred or the solicitor's bill is delivered to such plaintiff, and the Statute of Limitations runs from the time of payment (a).

Liability of
sureties for
payment of a
mortgage
debt kept
alive by
mortgagor's
payments to
mortgagee.

It not unfrequently happens that a bond is given by sureties, or that the mortgage deed itself contains a covenant by them, for payment of a mortgage debt. Under these circumstances, it has been held, that, assuming the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57) s. 8 (b), to apply to such a case, the remedy against the surety is not barred under that section by the lapse of 12 years, if meanwhile interest

(a) *Collinge v. Heywood*, 9 E. & E. 633, 639; *Spark v. Heslop*, 1 El. & El. 523; but see *Bullock v. Lloyd*, 2 C. & P. 119.

(b) Section 8 provides as follows:—"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

has been paid to the mortgagee by the mortgagor (c). On the other hand, when no such payment has been made and the mortgage debt is consequently barred, the remedy on any *personal* covenant or collateral bond entered into or given by the mortgagor to secure the mortgage debt is certainly also barred (d). Again, while, as just stated, a payment by a mortgagor will keep alive the remedy against his *surety*, a payment made by one of several persons jointly, or jointly and severally liable, will not prevent the Statute of Limitations from running in favour of the others (e), except where the payment is made by one of several *partners* in respect of a loan to *the firm*, in which case the payment of interest, after the retirement of one of them, by the continuing partners must, it seems, be taken to be made by them on his behalf and as his agents (f). This, it seems, was the law even before the passing of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97) (g).

In order to take a case out of the Statute of Limitations by acknowledgment, the latter must contain an express or implied promise to pay (h).

Requisites
of an
acknowledg-
ment
sufficient to
exclude
Statute of
Limitations.

(c) *In re Powers*, *Lindsell v. Phillips*, 30 Ch. D. 291; *In re Frisby*, *Allison v. Frisby*, 43 Ch. D. 106, C. A.

(d) *Sutton v. Sutton*, 22 Ch. D. 511, C. A.; *Fearnside v. Flint*, 22 Ch. 579.

(e) The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14; *Cockrill v. Sparkes*, 1 H. & C. 699; *Re Wolmershausen*, *Wolmershausen v. Wolmershausen*, 62 L. T. R. 541.

(f) *In re Tucker*, *Tucker v. Tucker*, (1894) 3 Ch. 429, C. A.; but see *Watson v. Woodman*, L. R. 20 Eq. 721.

(g) *Re Wolmershausen*, *Wolmershausen v. Wolmershausen*, 62 L. T. 541.

(h) *Ib.*; and see *Cockrill v. Sparkes*, 1 H. & C. 699.

APPENDIX.

38 & 39 VICT. c. 64 (a).

*An Act to repeal the Guarantee by Companies Act, 1867,
and to make other Provisions in lieu thereof.*

[11th August, 1875.]

WHEREAS by the Guarantee by Companies Act, 1867, the heads of public departments were authorized to accept as security for persons required to give security for the due performance of the duties of an office or employment in the public service the guarantee of a company which complied with the conditions contained in that Act, and received a certificate from the Treasury as provided by that Act : 30 & 31 Vict.
c. 108.

And whereas it is expedient that the power of the Treasury to give such certificate to a company as is provided by the said Act should cease, and that the said Act should be repealed, and other provision made as hereinafter mentioned :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

2. Where a person holding any office or employment in the public service is required by law to give security for the due performance of the duties of such office or employment, the Treasury may from time to time, if they think fit, by warrant made upon the representation of the head officer of the department in which such person serves, authorize that head officer, in such cases, under such circumstances, and upon such conditions as may be specified in the warrant, to vary the character of the security, notwithstanding that the same may be prescribed by any Act or otherwise. Power to
Treasury to
vary security.

(a) Section 1 of this statute is repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 39).

The Treasury may from time to time, by warrant made upon the like representation, revoke or vary any previous warrant made in pursuance of this section.

A warrant made in pursuance of this section may apply to any class of persons as well as to any single person.

Every warrant of the Treasury made in pursuance of this section shall be laid before both Houses of Parliament within one month after it is made, if Parliament be then sitting, or, if not, within one month after the then next Session of Parliament.

For the purposes of this section every person who is remunerated out of the consolidated fund, or out of moneys provided by Parliament, or out of fines or penalties, or other moneys which otherwise would be paid into the receipt of Her Majesty's Exchequer, or out of other public revenue, or who holds any public office or employment under the Crown in respect of which he is entitled to fees, shall be deemed to hold an office or employment in the public service.

The expression "Treasury" in this Act means the Commissioners of Her Majesty's Treasury.

Astosecurity
given before
the passing
of Act.

3. Where the guarantee of any company has, before the passing of this Act, been accepted as security for any person holding any office or employment in the public service, such guarantee shall continue to be received as security for such person, subject to any power which the head officer of the department in which such person serves may have to require some other security.

Short title.

4. This Act may be cited as the Government Officers (Security) Act, 1875.

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